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STATUTES

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§48-1
Statutory Construction

People v. Christensen, 102 Ill.2d 321, 465 N.E.2d 93 (1984) A criminal statute is to be strictly construed in favor of the accused. See also, People v. Chandler, 129 Ill.2d 233, 543 N.E.2d 1290 (1989).

People v. Haywood, 118 Ill.2d 263, 515 N.E.2d 45 (1987) Although penal statutes are to be strictly construed in favor of the accused, "they must not be so rigidly construed as to defeat the intent of the legislature."

People ex rel. Gibson v. Cannon, 65 Ill.2d 366, 357 N.E.2d 1180 (1976) A criminal or penal statute is to be strictly construed in favor of an accused, and nothing is to be taken by intendment or implication against him beyond the obvious or literal meaning of a statute. If a statute creating or increasing a penalty is capable of two constructions, the interpretation that operates in favor of the accused is to be adopted. Since the statute here is ambiguous on its face, it must be construed in favor of defendant.

People v. Isaacs, 37 Ill.2d 205, 226 N.E.2d 38 (1967) Repeal by implication is not favored, and even if there is an apparent inconsistency between two statutes they will be construed, insofar as possible, to preclude an implied repeal of one by the other.

People v. Whitney, 188 Ill.2d 91, 720 N.E.2d 225 (1999) The primary rule of statutory construction is to ascertain and give effect to the legislature's intent. The best means of determining legislative intent is the language chosen by the General Assembly, which is to be given its plain and ordinary meaning. Where statutory language is clear and unambiguous, it is to be given effect without resort to other aids to construction.

In general, penal statutes are strictly construed in favor of criminal defendants. Thus, any ambiguity in a penal statute must be resolved in favor of the defense. The trial court's construction of a statute is reviewed de novo.

In re Ryan B., 212 Ill.2d 226, 817 N.E.2d 495 (2004) "In the absence of a statutory definition indicating legislative intent, an undefined word must be given its ordinary and popularly understood meaning."

People v. Hicks, 101 Ill.2d 366, 462 N.E.2d 473 (1984) Where the terms of a statute are not defined, the courts will assume that they were intended to have their ordinary and popularly understood meanings unless doing so would defeat the perceived legislative intent.

People v. Ramirez, 214 Ill.2d 176, 824 N.E.2d 232 (2005) The fundamental rule of statutory construction is to ascertain and give effect to the legislature's intent. The best indication of legislative intent is the plain and ordinary meaning of the statutory language. Language that is clear and unambiguous must be applied without resort to further aids of statutory construction. A lower court's construction of a statute is reviewed de novo.

People v. Woodard, 175 Ill.2d 435, 677 N.E.2d 935 (1997) "There is no rule of construction which allows the court to declare that the legislature did not mean what the plain language of the statute imports. Where an enactment is clear and unambiguous, the court is not free to depart from the plain language and meaning of the statute by reading into it exceptions, limitations, or conditions that the legislature did not express, . . . nor is it necessary for the court to search for any subtle or not readily apparent intention of the legislature. . . . Where the language of the statute is clear and unambiguous, it will be given effect without resort to other

aides for construction."

People v. Lutz, 73 Ill.2d 204, 383 N.E.2d 171 (1978) Where the same words or phrases appear in different parts of the same statute, they will be given a generally accepted and consistent meaning unless the legislative intent is clearly to the contrary.

People v. Chandler, 129 Ill.2d 233, 543 N.E.2d 1290 (1989) The prime consideration in construing a statute is to give effect to the intent of the legislature, and courts may insert language into a statute that has been omitted through legislative oversight.

People v. Davis, 199 Ill.2d 130, 766 N.E.2d 641 (2002) Whether a lower court has correctly interpreted the provisions of the statute is a question of law and is reviewed de novo. When construing a statute the court must consider the statute in its entirety, including the subject addressed and the legislature's apparent objective. The most reliable indication of legislative intent is the language of the act, which if plain and unambiguous must be read without exception, limitation or condition.

In deciding that a pellet/BB gun is not a "dangerous weapon" under the armed violence statute, the court applied two additional doctrines of statutory construction. The doctrine of ejusdem generis provides that when a statutory clause specifically describes several classes of persons or things and then includes "other persons or things," the word "other" is interpreted as meaning "other such like." In addition, the "last antecedent doctrine" provides that "relative or qualifying words or phrases in a statute serve only to modify words or phrases which are immediately preceding," and not those which are more remote.

People v. Perry, 224 Ill.2d 312, 864 N.E.2d 196 (2007) The word "includes" does not limit a definition to the items specifically listed. The court found that the term "includes" indicates an illustrative rather than exclusive list.

In re Pronger, 118 Ill.2d 512, 517 N.E.2d 1076 (1987) In determining the intent of the legislature, the court is not confined to a literal examination of the statutory language. It is proper to consider both the history and course of the legislation and subsequent amendments to the statute. See also, Kirwan v. Welch, 133 Ill.2d 163, 549 N.E.2d 348 (1989).

People ex rel. Birkett v. Jorgensen, 216 Ill.2d 358, 837 N.E.2d 69 (2005) When interpreting a statute, the primary consideration is to ascertain and give effect to the legislature's intent. The best indication of legislative intent is the plain and ordinary meaning of the statutory language. When such language is clear and unambiguous, further aids to statutory construction are unnecessary.

However, it is presumed that the legislature did not intend an absurd, inconvenient or unjust result. Although penal statutes are construed to afford lenity to the accused, this rule applies only when the statute is ambiguous.

People v. Savory, 197 Ill.2d 203, 756 N.E.2d 804 (2001) Comments by the sponsor of legislation could not be used to justify a more restrictive finding of legislative intent than was suggested by the plain and unambiguous language chosen by the legislature.

People v. Grever, 222 Ill.2d 321, 856 N.E.2d 378 (2006) Generally, when the same words appear in different parts of the same statute, they carry the same meaning absent some contextual indication that the legislature intended otherwise.

People v. Carney, 196 Ill.2d 518, 752 N.E.2d 1137 (2001) The constitutionality of a statute is subject to de novo review. A statute carries a strong presumption of constitutionality, and the burden of rebutting that

presumption is on the party asserting unconstitutionality. Whenever possible, reviewing courts must construe a legislative act in a manner which upholds its constitutionality.

People v. Scheib, 76 Ill.2d 244, 390 N.E.2d 872 (1979) The courts do not favor a construction of a statute that would raise legitimate doubts as to its constitutionality.

A cardinal rule of statutory construction ordains that sections in pari materia should be considered with reference to one another so that both sections may be given harmonious effect.

People v. Haywood, 118 Ill.2d 263, 515 N.E.2d 45 (1987) Statutes are presumed to be constitutional, and it is the court's duty to construe statutes so as to affirm their constitutionality if such can reasonably be done. If a statute's construction is doubtful, the doubt will be decided in favor of validity.

People v. Bratcher, 63 Ill.2d 534, 349 N.E.2d 31 (1976) In ascertaining the intent of the legislature, courts must consider the entire statute, the evil to be remedied and the object to be attained. Subsequent amendments to a statute are an appropriate source of discerning legislative intent.

Finish Line Express v. Chicago, 72 Ill.2d 131, 379 N.E.2d 640 (1978) Legislative debates may be considered to determine the evil which legislation was intended to remedy.

People v. Hudson, 228 Ill.2d 181, 886 N.E.2d 964 (2008) Defendant was charged with home invasion under 720 ILCS 5/12-11(a)(2), which defines the offense as: (1) knowingly entering a residence without authority under certain circumstances, and (2) intentionally causing "any injury" to a person with within a dwelling place. On appeal, defendant argued that psychological trauma is not included within the phrase "any injury."

The Supreme Court rejected this argument. In the course of its opinion, the court rejected the argument that the comments of four legislators during legislative debates indicate that psychological harm was not intended to be included in the definition of "any injury":

> "[W]e note the pitfalls of relying upon such 'snippet[s] of legislative history.' . . . Defendants do not offer us any insight into the thoughts of the . . . remaining representatives, or the . . . members of the senate, all of whom had a vote to cast when this legislation was passed and enacted into law."

People v. Agnew, 105 Ill.2d 275, 473 N.E.2d 1319 (1985) When the legislature amends a statute, but leaves unchanged portions which have been judicially construed, the unchanged portions will retain the construction given them before the amendment.

People v. Nunn, 77 Ill.2d 243, 396 N.E.2d 27 (1979) An amendatory change in the language of a statute creates a presumption that it was intended to change the law as it theretofore existed. This presumption is not controlling when overcome by other considerations.

People v. Jones, 214 Ill.2d 187, 824 N.E.2d 239(2005) A statute will not be interpreted to effect a change in settled law unless its terms clearly require such a construction. See also, In re May 1991 Will County Grand Jury, 152 Ill.2d 381, 604 N.E.2d 929 (1992).

Williams v. Staples, 208 Ill.2d 480, 804 N.E.2d 489 (2004) Although a material change to a statute is generally presumed to have been intended to change the law, the circumstances surrounding the enactment of an amendment must also be considered. Thus, although the amendment of an unambiguous statute indicates a legislative intent to change the law, such intent is not inferred where the legislature amends an ambiguous statutory provision.

People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840 (1970) Where a statute has been judicially construed and the construction has not evoked an amendment, it will be presumed that the legislature acquiesced in the court's exposition of legislative intent.

Andrews v. Foxworthy, 71 Ill.2d 13, 373 N.E.2d 1332 (1978) Use of the words "shall" or "must" in a statute is generally regarded as mandatory. These terms do not have a fixed or inflexible meaning, however, and depending on the intent of the legislature may be construed as directory rather than mandatory. The proper interpretation must be grounded on the nature, objects and consequences from construing the statute one way or the other.

Here, the provision of the Revenue Act in question (that the supervisor of assessments "shall publish" assessments before a certain date) is mandatory and not merely directory. See also, People v. Armour, 59 Ill.2d 102, 319 N.E.2d 496 (1974) (provision that juvenile adjudicatory hearing shall be set within 30 days is directory); People v. Youngbey, 82 Ill.2d 556, 413 N.E.2d 416 (1980) (provision that defendant shall not be sentenced without a presentence report is mandatory); People v. Davis, 93 Ill.2d 155, 442 N.E.2d 855 (1982) (provision that judge state reasons for the sentence is directory).

People v. Warren, 173 Ill.2d 348, 671 N.E.2d 700 (1996) For portions of a statute to be severable, two requirements must be satisfied. First, provisions are not severable if they are so mutually connected and dependent that they are "essentially and inseparably connected in substance." Second, provisions are severable only if the legislature would have passed the valid portions of the statute without the invalid portions. See also, Best v. Taylor Machine Works, 179 Ill.2d 367, 689 N.E.2d 1057 (1997) (express severability clause merely creates rebuttable presumption that legislature intended provisions to be severable).

People v. Jordan, 218 Ill. 2d 255, 843 N.E.2d 870 (2006) Severance is appropriate if, upon removing the unconstitutional provision, the remainder of the statute is complete in itself and capable of being independently executed.

People v. Hanna, 207 Ill.2d 486, 800 N.E.2d 1201 (2003) Administrative regulations have the force and effect of law, and are to be construed by standards governing the construction of statutes. The cardinal rule of statutory construction, to which all other rules are subordinate, is to ascertain and give effect to the drafter's intentions.

The most reliable indicator of intent is found in the language of the regulation itself, which is to be given its plain, ordinary and popularly understood meaning. Where a plain or literal reading produces an absurd result, however, the literal reading must yield.

People v. Bonutti, 212 Ill.2d 182, 817 N.E.2d 489 (2004) Administrative regulations have the force and effect of law and are to be construed according to the standards that govern statutory construction. The fundamental rule of statutory construction is to ascertain and give effect to the intent of the drafters, and the best indication of the drafters' intent is the plain and ordinary meaning of the statutory language.

People v. Fitzgibbon, 184 Ill.2d 320, 704 N.E.2d 366 (1998) Supreme Court Rules are to be construed in accordance with standard statutory rules of construction. See also, People v. Richmond, 188 Ill.2d 376, 721 N.E.2d 534 (1999) (where the language of a Supreme Court rule is clear and unambiguous, it will be applied as written, without resorting to statutory rules of construction).

Client Follow-Up Co. v. Hynes, 75 Ill.2d 208, 390 N.E.2d 847 (1979) In construing the meaning of a constitutional provision, it is appropriate to examine the provision in light of the history and conditions of the times and the particular problem that the convention sought to address. Constitutional debates may be

helpful in understanding the provision; in addition, because the true inquiry concerns the understanding of the voters, official and unofficial publications and information disseminated to the voters may be considered.

People v. McCarty, 223 Ill.2d 109, 858 N.E.2d 15 (2006) 720 ILCS 570/401(a)(6.5)(D), which imposes a sentence of 15 to 60 years for manufacture of more than 900 grams of any substance containing methamphetamine, was intended to include byproducts of the manufacturing process in the weight calculation. Statements of legislative intent have no substantive legal force and do not create ambiguity in an otherwise unambiguous statute.

People v. Bywater, 223 Ill.2d 477, 861 N.E.2d 989 (2006) The best indication of legislative intent is the language of the statute; when the language is unambiguous, the statute must be applied as written and without resorting to other aids of construction. "A statute must be considered in its entirety, though, keeping in mind the subject it addresses and the legislature's apparent objective in enacting it."

625 ILCS 5/2-118.1(b) provides that a hearing on a petition to rescind a summary suspension of a driver's license must be held "[w]ithin 30 days after receipt of the written request." On July 11, 2002, defendant filed a petition to rescind a summary suspension, and sent a copy of that filing to the State by first class mail. The hearing was held 34 days later.

The plain language of the statute requires a hearing within 30 days after the petition is filed with the circuit clerk. To read in a requirement that the 30-day time period does not begin to run until the State's receipt of service would contravene the statute's plain language. When statutory language is unambiguous it must be applied as written.

People v. Christopherson, 231 Ill.2d 449, 899 N.E.2d 257 (2008) 235 ILCS 5/6-16(a)(iii), which provides that no person shall give alcoholic liquor "to another person under the age of 21 years, except in the performance of a religious ceremony or service," applies to minors who supply alcohol to other minors.

People v. McCarty, 86 Ill.2d 247, 427 N.E.2d 147 (1981) The legislature's classification of cocaine as a "narcotic drug" is valid. The legislature is not bound to follow previously existing definitions; though cocaine is not medically or pharmacologically a narcotic, legislative definitions may "create a narrower or broader meaning of terms for the purpose of the statute than would other definitions commonly used."

People v. Prouty, 385 Ill.App.3d 149, 895 N.E.2d 48 (2d Dist. 2008) The statute on statutes (5 ILCS 70/6) provides that where two or more acts relate to the same subject and are enacted at the same legislative session, they are to be construed to give full effect to each Act, unless there is an irreconcilable conflict. If an irreconcilable conflict exists, the last Act passed by the legislature is controlling to the extent of the conflict. Public acts amending a single section of a statute are in irreconcilable conflict only if inconsistent changes are made.

There was no irreconcilable conflict between Public Act 94-116, which made aggravated DUI a Class 2 felony, and Public Act 94-609, which was passed four days later and which changed a different subparagraph of the statute to limit the trial court's discretion to impose probation for certain DUI's. Although P.A. 94-609 omitted the changes which had been passed four days earlier, the statutes could be construed consistently and the drafters of the second act merely overlooked the just-enacted changes. See also, People v. Maldonado, 386 Ill.App.3d 964, 897 N.E.2d 854 (2d Dist. 2008) (no irreconcilable conflict between P.A. 94-329 and P.A. 94-609 or between 94-329 and 94-963, all of which amended the DUI statute).

People v. Tellez, 295 Ill.App.3d 639, 693 N.E.2d 516 (2d Dist. 1998) Where the criminal neglect of a disabled person statute provided that "criminal neglect of an elderly person is a Class 3 felony," but did not provide a penalty for neglect of a disabled person, the trial court erred by holding that criminal neglect of

a disabled person is an unclassified petty or business offense. The penalty provision "becomes ambiguous when the statute is read as a whole because the two crimes [neglect of the elderly and neglect of the disabled] are treated in exactly the same manner throughout the rest of the statute." The failure to include the words "or disabled" in the penalty section was a legislative oversight; the legislature intended to create a Class 3 offense when the victim is either elderly or disabled. See also, People v. Smith, 307 Ill.App.3d 414, 718 N.E.2d 640 (1st Dist. 1999) (a charge of indecent solicitation of a child predicated on predatory criminal sexual assault of a child is not void because the statute defining the offense fails to provide a sentence; the legislature intended the same sentence as where indecent solicitation is predicated on aggravated criminal sexual assault, an offense that is similar to predatory criminal sexual assault of a child).

People v. Ousley, 383 Ill.App.3d 1073, 892 N.E.2d 45 (1st Dist. 2008), petition for leave to appeal allowed, 229 Ill.2d 686, 900 N.E.2d 1123 (No. 107242, 11/26/08) 725 ILCS 5/106-2.5, which provides that upon the prosecution's motion the court "shall" grant use immunity to a witness who has refused to testify or who is likely to invoke the Fifth Amendment privilege against self-incrimination, does not apply where the State seeks to compel one codefendant to testify at a joint trial.

The word "shall" may be either permissive or mandatory. Where the legislature chooses to impose a mandatory sanction for the failure to follow a statute, there is strong evidence that a mandatory construction was intended. See also, People v. Bilelegne, 381 Ill.App.3d 292, 887 N.E.2d 564 (1st Dist. 2008) (strong indication of an intent to create a mandatory duty occurs where the legislature proscribes specific consequences for failing to comply with a statutory requirement).

People v. Purcell, 325 Ill.App.3d 551, 758 N.E.2d 895 (2d Dist. 2001) The unconstitutional portion of a statute may be severed, and the remainder of the statute preserved, where the remainder "is complete in and of itself and is capable of being executed wholly independently of the severed portion." Generally, unconstitutional portions of statutes should be severed where the General Assembly would have adopted the remainder of the act without the unconstitutional portion.

People v. Kohl, 364 Ill.App.3d 495, 847 N.E.2d 150 (2d Dist. 2006) The primary objective when construing the meaning of a statute is to give effect to the legislature's intent. In doing so, a court must presume that the legislature did not intend unjust, inconvenient, or absurd results. In addition, any ambiguity in a penal statute must be construed in favor of the accused.

Because the term "metal knuckles" is not defined by the statute creating the offense of unlawful use of a weapon by felon, the court examined several dictionary definitions before concluding that the term should be defined as a device which fits across the fingers and which is intended to protect the fingers and increase the power of a punch.

People v. Terry, 342 Ill.App.3d 863, 795 N.E.2d 1028 (1st Dist. 2003) The plain language of 720 ILCS 5/32-4A(a), which creates the offense of harassment of a potential witness, applies only where legal proceedings are pending. While the State presented a valid policy argument for protecting potential witnesses even after a case has ended, the court refused to "expand the scope of this statute by affirmatively altering its language - particularly because we are required to strictly construe this criminal statute in favor of the accused."

People v. Williams, 376 Ill.App.3d 875, 876 N.E.2d 235 (1st Dist. 2007) Whether a federal statute preempts a state statute is a question of law subject to de novo review. Further, whether a state statute is preempted by federal law is a question of congressional intent.

In re Jordan G., 2015 IL 116834 (No. 118634, 2/20/15)

Whether parts of a statute that have been declared unconstitutional may be severed from the rest of the statute involves questions of statutory interpretation and legislative intent. Where a statute does not contain its own severability provision, the severability section of the Statute on Statutes is utilized. That statute provides that the invalidity of one provision of a statute does not affect other provisions which can be given effect without the invalid provision. (5 ILCS 70/1.31).

In re Michael D., 2015 IL 119178 (Docket No. 119178, 12/17/15)

The same rules of construction apply to both statutes and Supreme Court Rules. When interpreting statutes and rules, the primary goal is to ascertain and give effect to the intent of the drafters. The most reliable indicator of the drafters' intent is the plain and ordinary meaning of the language used.

Where the language of a statute or rule is clear, it must be given effect without resort to other tools of interpretation. It is improper to depart from the plain language by creating exceptions, limitations, or conditions which conflict with clearly expressed legislative intent.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

In re M.I., 2013 IL 113776 (No. 113776, 5/23/13)

1. Whether a statutory command is mandatory or directory is a question of statutory construction that is reviewed *de novo*. Statutes are mandatory if the intent of the legislature dictates a particular consequence for the failure to comply with the provision. In the absence of such legislative intent, the statute is directory and no specific consequence flows from noncompliance. The use of the word "shall" is not determinative of the mandatory/directory question.

A presumption exists that language issuing a procedural command to a government official indicates that the statute is directory. This presumption is overcome when: (1) there is negative language prohibiting further action in the case of noncompliance; or (2) the right that the provision is designed to protect would be injured under a directory reading.

The Extended Juvenile Jurisdiction (EJJ) statute provides that a hearing on a State's motion to designate a proceeding as an EJJ proceeding "shall commence . . . within 30 days of the filing of the motion, unless good cause is shown . . . [in which case] the hearing shall be held within 60 days of the filing of the motion." 705 ILCS 405/5-810(2). While use of the word "shall" indicates that the court has an obligation to hold a hearing on the motion, use of that term does not control the mandatory/directory question. The EJJ statute is presumed directory because it issues a procedural command to a government official.

The presumption that the statute is directory is not overcome by either condition. The statute lacks any negative language prohibiting further action if the hearing is not held within 60 days. The right that the statute is designed to protect was not injured under a directory reading. The minor received notice of the motion and a hearing before being subject to an EJJ proceeding and has not shown how he was prejudiced by a hearing conducted outside the 60-day limit. The court rejected the minor's arguments that a mandatory reading would eliminate any "state of uncertainty" for the minor, unnecessary delays, and use of the motion as a litigation tactic.

2. To bring a constitutional challenge, a person must be within the class aggrieved by the alleged unconstitutionality, or the unconstitutional feature must be so pervasive as to render the entire statute invalid. A person has no standing to argue that the statute would be unconstitutional if applied to third parties in hypothetical situations.

Under the EJJ statute, the stay of an adult sentence may be revoked when the minor violates the conditions of his sentence, or is alleged to have committed a new offense. 705 ILCS 405/5-810(6). Although contained within the same statutory subsection, these are separate provisions with separate consequences.

A petition to revoke was filed against the minor solely on the basis of his commission of a new offense. Because the minor argued only that the term "conditions" is vague, and made no vagueness challenge to the alleged basis for revocation of the stay in his case, he has no standing to make a

constitutional challenge to the statute.

(Respondent was represented by Assistant Defender Emily Filpi, Chicago.)

In re S.B., 2012 IL 112204 (No. 112204, 10/4/12)

Noting that it has authority to read into statutes language which the legislature omitted by oversight, the court elected to allow unfit juveniles who are found "not not guilty" in a discharge hearing to seek termination of the sex offender registration requirement under the same conditions as minors adjudicated delinquent for sex offenses. The court also found that the legislature made a similar oversight with respect to the limitations that are contained in the Sex Offender Community Notification Law (730 ILCS 152/121) related to the dissemination of sex offender registration information with respect to adjudicated delinquents. It held that §121 of that Act should be read to include juveniles found "not not guilty" following a discharge hearing.

People v. Blair, 2013 IL 114122 (No. 114122, 3/21/13)

When a statute is held facially unconstitutional, *i.e.*, unconstitutional in all its applications, it is said to be void *ab initio*. Such a declaration by a court cannot, within the strictures of the separation of powers clause, repeal or otherwise render the statute nonexistent. Rather, the statute is only considered unconstitutional from the moment of its enactment, and therefore unenforceable, but it remains on the statute books.

Ordinarily, the only way that the legislature may then remedy the statute's infirmity is by amending or reenacting the statute that was held unconstitutional. This is not the only recourse, however, when the infirmity in the statute is that it violates the proportionate penalties clause under the identical elements test. In that case, the proportionality violation arises out of the relationship of two statutes – the challenged statute and the comparison statute. To cure the infirmity, the legislature may amend the challenged statute, the comparison statute, or both.

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the court held that the sentence for armed robbery while armed with a firearm, which included a 15-year mandatory enhancement, violated the proportionate penalties clause because it was more severe than the penalty for the identical offense of armed violence based on robbery with a category I or II weapon. The legislature's subsequent enactment of P.A. 95-688 (eff. 10/23/07), which amended the armed violence statute to eliminate robbery as a predicate offense, remedied the disproportionality and revived the sentencing enhancement for armed robbery.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Clemons, 2012 IL 107821 (No. 107821, 4/19/12)

While the General Assembly can pass legislation to prospectively change a judicial construction of a statute if it believes that the judicial interpretation is at odds with legislative intent, it cannot effect a change in that construction by a later declaration of what it had originally intended.

After the court in **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), interpreted the armed violence statute to preclude armed robbery, but not robbery, as a predicate offense to armed violence, the legislature amended the statute to preclude robbery as a predicate offense. This amendment could not be construed as a clarification of the legislature's intent under the preamended statute because it was adopted post-**Hauschild**.

(Defendant was represented by Assistant Defender Susan Wilham, Springfield.)

People v. Close, 238 Ill.2d 497, 939 N.E.2d 463, 2010 WL 4126454 (2010)

A statutory exception which withdraws specified acts or persons from the operation of a statute is not an element of the offense, but a matter of defense. By contrast, an exception which is part of the definition of an offense (*i.e.,* "is descriptive of the offense") must be negated by the prosecution in order to prove the offense.

The possible application of a restricted driving permit is not an element of driving with a revoked license, but a matter of defense which the accused may raise.

People v. Comage, 241 Ill.2d 139, 946 N.E.2d 313 (2011)

720 ILCS 5/31-4(a) defines the offense of obstructing justice as "[d]estroy[ing], alter[ing], conceal[ing] or disguis[ing] physical evidence, plant[ing] false evidence, [or] furnish[ing] false information" with intent "to prevent the apprehension or obstruct the prosecution or defense of any person." Because §31-4(a) does not define the word "conceal," the court applied a definition contained in Webster's dictionary from 1961, the year §31-4(a) was adopted. (See **DISORDERLY, ESCAPE, RESISTING AND OBSTRUCTING OFFENSES**, §16-2).

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Diggins, 235 Ill.2d 48, 919 N.E.2d 327 (2009)

The fundamental rule of statutory construction is to ascertain and give effect to the intention of the legislature. The best indication of legislative intent is the language of the statute, which must be given its plain and ordinary meaning. Where statutory language is clear and unambiguous, it will be applied as written without resort to other sources of statutory construction. (See also **UNLAWFUL USE OF A WEAPON**, §53-5(c).)

People v. Elliott, 2014 IL 115308 (No. 115308, 1/24/14)

The subsequent rescission of a statutory summary suspension does not render invalid a conviction for driving on a suspended license where the conduct of driving on the suspended license occurs after the license has been suspended but before the suspension has been rescinded.

Here, defendant's license was suspended on October 11. Two days later, defendant was arrested and charged with driving on a suspended license. Six days after that, the circuit court rescinded the suspension. The Illinois Supreme Court held that the rescission only applied prospectively; it did not apply retroactively to render the charge of driving on a suspended license invalid.

Under 625 ILCS 5/2-118.1(b), a trial court has the authority to "rescind" a statutory summary suspension. The term "rescind" has numerous meanings, both legal and non-legal, and depending on the particular definition and context, can have either prospective or retroactive meaning. Similarly, the Illinois legislature uses the term "rescind" inconsistently, sometimes intending a retroactive meaning while other times a prospective meaning. But for a number of reasons, the legislature intended the term "rescind" to be prospective in the summary suspension statute.

First, a prospective reading best comports with the public policy behind the statutory summary suspension statute. That policy is to remove offending drivers from the road swiftly and certainly, not hopefully or eventually, and a prospective reading accomplishes this far better than a retroactive reading which would make the suspension contingent on future court proceedings.

Second, a prospective reading best comports with other provisions of the Illinois Vehicle Code relating to statutory summary suspensions. For example, some provisions state that a pending petition to rescind shall not stay or delay the summary suspension. Others make it a crime to drive at a time when a license is suspended. The provisions therefore suggest that the suspension remains in effect until proven to be invalid, supporting a prospective reading.

Third, a prospective reading makes the legislative scheme easy and convenient to enforce since courts only need to determine the status of the driver's license at the time of the arrest. A retrospective reading by contrast introduces uncertainty and inefficiency into the system.

Finally, a prospective reading is consistent with the way prior decisions have characterized the statutory summary suspension scheme by, for example, stating that a defendant must file a petition to determine whether the suspension should be lifted.

For these reasons, in relation to the crime of driving on a suspended license, the recision of a

statutory summary suspension is of prospective effect only.

People v. Garcia, 241 Ill.2d 416, 948 N.E.2d 32 (2011)

1. When construing a statute, the reviewing court's fundamental objective is to give effect to the legislature's intent. The best indication of legislative intent is the plain and ordinary meaning of the statutory language. However, a reviewing court may also consider the underlying purpose of the statute, the evil sought to be remedied, and the consequences of construing the statute in one manner versus another. It is always presumed that the legislature did not intend to cause absurd, inconvenient, or unjust results. Furthermore, statutes must be construed in the most beneficial way which their language will permit so as to prevent hardship, injustice, or prejudice to the public interest.

2. Although the rule of lenity generally requires that a penal statute be strictly construed in favor of the accused, the rule of lenity does not require a reviewing court to construe a statute so rigidly as to circumvent the legislature's intent. "[T]he primacy of legislative intent is paramount, and all other rules of statutory construction are subordinate to it."

3. The court concluded that 730 ILCS 5/5-5-3.2(b)(1), which authorizes an extended term where the defendant is convicted of a felony after having been previously convicted of the same or greater class felony within the past 10 years, excluding time spent in custody, should be construed to exclude from the 10-year period time lapsed when the defendant avoids trial by fleeing the jurisdiction. (See **SENTENCING,** §45-10(c)(2)).

(Defendant was represented by Assistant Defender Deborah Nall, Chicago.)

People v. Geiler, 2016 IL 119095 (No. 119095, 7/8/16)

The mandatory/directory distinction involves the question of whether the failure to comply with a particular procedural step will or will not invalidate a governmental action. Courts presume that procedural commands to government officials are directory. The presumption is overcome and a provision becomes mandatory only if: (1) negative language in the statute or rule prohibits further action where there is noncompliance; or (2) the right the statute or rule protects would generally be injured by a directory reading.

Illinois Supreme Court Rule 552 governs the processing of traffic citations and imposes an obligation on the arresting officer to transmit specific portions of the ticket to the circuit court within 48 hours after the arrest. Here the arresting officer gave defendant a speeding ticket on May 5 but did not transmit the ticket to the circuit court until May 9, clearly beyond the 48 hour time limit. There was no dispute that Rule 552 was violated; the only issue was the appropriate consequences for the violation.

Rule 552 merely provides that the arresting officer shall transmit the ticket to the circuit court within 48 hours. It does not specify any consequences for the violation or contain nay negative language prohibiting prosecution or further action where there has been noncompliance. Thus the negative language exception does not apply.

Rule 552 is designed to ensure judicial efficiency and uniformity in processing tickets. A directory reading of Rule 552 would not generally injure judicial efficiency or uniformity. In this case, there was no evidence that the delay in transmitting the citations impaired the trial court's management of its docket. There was also no indication that the delay would ordinarily prejudice the rights of a defendant. A defendant's first appearance on a traffic citation must be set within 14 and 60 days after arrest. Thus even if the citation is not transmitted within 48 hours, it may still be filed before defendant's first court appearance and he would be unaffected by the delay.

The court therefore concluded that Rule 552 is directory and no specific consequence is triggered by noncompliance. But a defendant may still be entitled to relief if he can demonstrate that he was prejudiced by the violation.

People v. Giraud, 2012 IL 113116 (No. 113116, 11/29/12)

The primary objective of legislative interpretation is to ascertain and give effect to legislative intent,

the most reliable indicator of which is the plain and ordinary meaning of the statutory language. In determining the plain meaning of statutory language, reviewing courts must consider the statute in its entirety, bearing in mind the subject addressed and the apparent intent of the legislature. Where statutory language is clear and unambiguous, it must be applied as written without resort to extrinsic aids of statutory construction.

If statutory language is ambiguous, the statute is to be construed so that no part is rendered meaningless or superfluous. Principles of statutory construction are not rules of law, but are merely aids in determining legislative intent and "must yield to such intent."

The court concluded that the legislature intended for the aggravating factor of 720 ILCS 5/12-14(a)(3) (threatening or endangering the life of the victim during a criminal sexual assault) to apply only if the threat or endangerment actually occurred during the offense. Thus, exposing the victim to the possibility of some day contracting HIV did not qualify as the aggravating factor.

(Defendant was represented by Assistant Defender Amanda Ingram, Chicago.)

People v. Gutman, 2011 IL 110338 (No. 110338, 12/1/11)

720 ILCS 5/29B-1(a) defines the offense of money laundering as engaging in certain transactions with "criminally derived property." "Criminally derived property" is defined as "any property constituting or derived from proceeds obtained, directly or indirectly, pursuant" to certain criminal activity. The term "proceeds" is not statutorily defined.

The Supreme Court found that the term "proceeds" could refer to either the gross receipts of a criminal enterprise or merely to the "profits" of that enterprise. The court concluded that the legislature intended the term "proceeds" to include the "gross receipts," rejecting defendant's argument that under the rule of lenity the interpretation most favorable to the defendant should be applied. The court stressed that the rule of lenity "must not be stretched so far or applied so rigidly as to defeat the legislature's intent"; examination of legislative history and application of principles of statutory construction lead to the conclusion that the Illinois legislature intended to include the gross receipts of the criminal activity within the definition of the term "proceeds."

People v. Hawkins, ___ Ill.2d ___, 952 N.E.2d 624 (2011) (No. 110792, 6/16/11)

1. In construing statutes, the primary objective is to ascertain and give effect to the intent of the legislature. The most reliable indication of the legislature's intent is the plain language of the statute. *W*hen the language of the statute is clear and unambiguous, it must be applied as written without resort to extrinsic aids or tools of interpretation.

If the language of a statute is ambiguous, determination of legislative intent includes consideration of the purpose of the law, the evils it was intended to remedy, and relevant legislative history. Multiple statutes relating to the same subject are presumed to have been intended to be consistent and harmonious.

A statute should be read as a whole and construed so as to give effect to every word, clause, and sentence; a statute must not be read so as to render any part superfluous or meaningless. However, the court is not bound by the literal language of a statute if that language produces absurd or unjust results not contemplated by the legislature.

2. The court concluded that statutes relating to a prisoner's obligation to reimburse the State for the costs of incarceration were ambiguous concerning what assets are available to satisfy the obligation. Furthermore, a literal interpretation of the statutes would create absurd results because prisoners would be encouraged to work to learn a new trade and to provide money to assist in reintegrating into the community, only to have that money seized as partial payment of the costs of incarceration.

Thus, prison wages in excess of the "portion" which DOC was statutorily authorized to take as payment for incarceration costs could not be seized as payment of such costs. Approximately $11,000 which defendant had been able to save from his wages while he was incarcerated could not be seized by DOC.

People v. Jackson & Lee, 2011 IL 110615 (Nos. 110615 & 110702, 9/22/11)

1. The court discussed several rules of statutory construction. The construction of a statute is a question of law, which is reviewed *de novo*. The primary objective of statutory construction is to ascertain and implement the intent of the legislature. The most reliable indication of legislative intent is the plain and ordinary meaning of the statutory language.

A court must view the statute as a whole, construing words and phrases in light of other relevant statutory provisions and not in isolation. Each word, clause, and sentence is to be given a reasonable meaning if possible, and should not be rendered superfluous. The court may also consider the reason for the law, the problem sought to be remedied, the purposes to be achieved, and the consequences of construing the statute one way or another. The court presumes that the legislature did not intend to create absurd, inconvenient, or unjust results.

A subsequent amendment to a statute may be an appropriate source for discerning legislative intent. An amendatory change in statutory language creates a presumption that the legislature intended to change the statute as it previously existed. However, this presumption may be overcome by other considerations; if the circumstances surrounding the amendment indicate that the legislature intended only to interpret the original statute, the presumption is rebutted.

Among the circumstances which may indicate that an amendment was intended merely to clarify the law are whether the enacting body declares that it was clarifying a prior amendment, whether a conflict or ambiguity existed prior to the amendment, and whether the amendment is consistent with a reasonable interpretation of the prior enactment and its legislative history.

2. Under the rule of "lenity," a court strictly construes ambiguous criminal statutes to afford leniency to the accused. However, the cardinal principle of statutory construction, to which all other rules are subordinate, is that a court must ascertain and give effect to the intent of the legislature. The rule of lenity does not allow a court to construe a statute so rigidly as to defeat the legislature's intent.

(Defendant Jackson was represented by Assistant Defender David Harris, Chicago.)

(Defendant Lee was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Johnson, 2013 IL 114639 (No. 114639, 9/19/13)

A court's primary objective in construing a statute is to ascertain and give effect to the intent of the legislature, bearing in mind that the best evidence of such intent is the statutory language, given its plain and ordinary meaning. Where the statutory language is clear and unambiguous, a court will apply the language as written.

When statutory terms are not defined, courts presume that the legislature intended the terms to have their popularly understood meaning. If a term has a settled legal meaning, courts will normally infer that the legislature intended to incorporate the established meaning. Questions of statutory construction are reviewed *de novo*.

The Counties Code provides that "State's attorneys shall be entitled to the following fees: * * * For each day actually employed in the hearing of a case of habeas corpus in which the people are interested, $50." 55 ILCS 5/4-2002.1(a).

Because the term "habeas corpus" is not defined in the Counties Code, the court presumed that the legislature intended that the term be given its popularly understood or settled legal meaning. There are numerous types of writs of habeas corpus, but the term "habeas corpus" refers to a writ employed to bring a person before a court, most frequently to ensure that the person's imprisonment or detention is not illegal. The plain and ordinary meaning of the term therefore only applies to various types of habeas corpus proceedings, not generically to all collateral proceedings.

The term first appeared in the statute in a 1907 amendment prior to creation of post-conviction and §2-1401 proceedings. The legislature could have amended the statute to include other collateral proceedings, but has not. The court refused to read words or meanings into the statute when the legislature has chosen not to include them.

(Defendant was represented by Assistant Defender Yasaman Navai, Chicago.)

People v. Kitch, 239 Ill.2d 452, 942 N.E.2d 1235 (2011)

1. A statute is unconstitutional on its face only if no set of circumstances exist under which it would be valid.

Section 115-10 of the Code of Criminal Procedure, 725 ILCS 5/115-10 allows admission of a child victim's hearsay statements under two scenarios: (1) the court finds the statement reliable and the child testifies at trial, or (2) the child does not testify, the court finds the statement reliable, and the allegation of sexual abuse is independently corroborated.

The confrontation clause places no restriction on the admission of hearsay testimony under scenario one above since the declarant testifies at trial and is present to defend or explain that testimony. Where the child does not testify under scenario two above, testimonial statements are admissible under **Crawford v. Washington**, 541 U.S. 36 (2004), only if the defendant had a prior opportunity to cross-examine the declarant.

That under both scenarios the statement must also meet the additional reliability requirement set forth in **Ohio v. Roberts**, 448 U.S. 56 (1980), that was repudiated in **Crawford**, is not problematic. This requirement only provides the defendant with additional protection over and above that provided by the confrontation clause. It does not affect the constitutionality of § 115-10 because the hearsay testimony must still satisfy **Crawford**'s constitutional requirements in addition to the statutory requirement of reliability. The evidentiary question of whether hearsay testimony satisfies a statutory exception such as § 115-10 is separate from, and antecedent to, the issue of whether admitting the testimony satisfies the confrontation clause. Therefore, the fact that § 115-10 does not incorporate the limitations on admissibility imposed by **Crawford** does not affect its constitutionality.

2. When construing a statute, a court must give effect to the legislature's intent, considering the subject that the statute addresses, and the legislature's apparent objective in enacting it, and adopting the plain and ordinary meaning of the statutory terms.

By statute, the State's Attorney of a county is entitled to a $50 fee "for each case of appeal taken from his county *** to the Supreme or Appellate Court when prosecuted *** by him." 55 ILCS 5/4-2002(a). This fee applies when the State's Attorney requests that the State's Attorneys Appellate Prosecutor appear. Any case in which the SAAP appears is by necessity prosecuted or defended by a State's Attorney. By statute, SAAP attorneys appear when requested to do so and at the direction of a State's Attorney. 725 ILCS 210/4.01. SAAP attorneys act with the advice and consent of the State's Attorney. Therefore State's Attorneys retain a central role in the appeal even where they utilize SAAP's services, and are entitled to the State's Attorney's fee.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Marshall, 242 Ill.2d 285, 950 N.E.2d 688 (2011)

The primary objective of statutory interpretation is to ascertain and give effect to the intent of the legislature. Inquiry always begins with the language of the statute, which is the most reliable indicator of legislative intent. A court construes a statute as a whole and affords the language of a statute its plain and ordinary meaning. Where the language is clear and unambiguous, a court must apply the statute without further aids of statutory construction. If the statute is capable of being understood by reasonably-informed persons in two or more different ways, the statute will be deemed ambiguous, and the court may consider extrinsic aid of construction to discern the legislative intent.

The statutory language of 730 ILCS 5/5-4-3, which requires qualifying offenders to submit a DNA sample and pay an analysis fee of $200, is silent on the question of whether offenders are required to submit duplicative samples upon each qualifying event. This silence created an ambiguity in the statute that permits a court to look to extrinsic aids of construction. Substantial weight and deference must be given to the interpretation of an ambiguous statute by the agency charged with its administration and enforcement. The

administrative code that guides agencies in implementing §5-4-3 requires collection of a DNA sample only if "the qualifying offender has not previously had a sample taken." Therefore, in practice, a facility or agency charged with administering the statute would not interpret it to require collection of DNA from an offender who has already submitted a sample.

Accordingly, the statutory language requiring "[a]ny [qualifying] person" to submit a DNA sample only identifies the population whose DNA must be present in the database. 730 ILCS 5/5-4-3(a). Similarly, the $200 analysis fee required by subsection (j) "shall" be paid only when the actual extraction, analysis and filing of the qualified offender's DNA occurs. Therefore, the statute authorizes a judge to order a defendant to submit a sample and pay a fee only where the defendant is not currently registered in the DNA database

The court found support for this interpretation by comparing the language of §5-4-3 to the language of 730 ILCS 5/5-5-3(g), which provides for collection of biological data from certain offenders. The plain language of that statute directs that "[w]henever," i.e., each and every time, an offender commits the enumerated offense, he is subject to the testing requirement.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Mosley, 2015 IL 115872 (No. 115872, 2/20/15)

The issue of severability involves questions of statutory interpretation and legislative intent. Where a statute does not contain its own severability provision, the severability section of the Statute on Statutes is utilized. That statute provides that the invalidity of one provision of a statute does not affect other provisions which can be given effect without the invalid provision. (5 ILCS 70/1.31).

(Defendant was represented by Assistant Defender Gilbert Lenz, Chicago.)

People v. Ousley, 235 Ill.2d 299, 919 N.E.2d 875 (2009)

1. In construing the meaning of a statute which contains the term "shall", two related but separate inquires may arise. First, the court may be called upon to determine whether the statute is "mandatory" or "permissive." In this context, the term "mandatory" refers to an obligatory duty which a governmental entity is required to perform, as opposed to a permissive power which it may choose whether or not to exercise.

Second, the court may be required to determine whether the statute is "mandatory" or "directory." This inquiry "simply denotes whether the failure to comply with a particular procedural step" has "the effect of invalidating the governmental action to which the procedural requirement relates." In other words, the "mandatory-permissive" issue determines whether the language of the statute has the force of a command or is merely a grant of permission, while the "mandatory-directory" issue concerns the consequences of failing to fulfill an obligation.

2. When the "mandatory-directory" determination is at issue, use of the word "shall" is not determinative. By contrast, when the issue is whether the statutory language is "mandatory" or "permissive," use of the word "shall" usually indicates a legislative intent to impose a mandatory obligation.

3. See also **IMMUNITY**, Ch. 28.

People v. Rinehart, 2012 IL 111719 (No. 111719, 1/20/12)

If a statute's language is unclear or ambiguous, or susceptible of more than one reasonable reading, a court must resort to sources other than the plain language of the statute to ascertain the legislature's intent. Such sources include the maxim of *in pari materia*, under which two statutes, or two parts of one statute, concerning the same subject must be considered together in order to produce a harmonious whole. Words and phrases should be construed not in isolation, but in light of other relevant provisions. The statute must be considered in its entirety, keeping in mind the subject that it addresses and the legislature's apparent purpose in enacting it.

The statute can be read as either requiring the trial court to choose a term within that range or setting the term as the range itself. The court therefore looked to other sources to determine whether the legislature intended a determinate or indeterminate MSR term.

Subsection (d)(4) was part of Public Act 94-165, which created a comprehensive scheme for certain sex offenses. An offender's parole officer must prepare a progress report every 180 days, and the offender may request discharge from MSR upon the recommendation of the officer. 730 ILCS 5/3-14-2.5. The scheme marked a philosophical and procedural change in how parole operates for defendants convicted of sex offenses. The legislature thus abandoned the structure of determinate MSR terms and adopted a structure of indeterminate or extended MSR terms for sex offenders precisely because it viewed sex offenses differently, due to the risk of recidivism.

(Defendant was represented by Assistant Defender Colleen Morgan, Springfield.)

People v. Tousignant, 2014 IL 115329 (No. 115329, 2/21/14)

The same principles that govern the interpretation of statutes govern the interpretation of Supreme Court rules. The goal is to ascertain and give effect to the intention of the rule's drafters. While the word "or" is generally disjunctive, it will not be given its literal meaning where to do so would frustrate the drafter's intent. In those circumstances, "or" will be considered to mean "and."

The Court found that Supreme Court Rule 604(d) was intended to ensure that all issues concerning a guilty plea be presented to the trial court in a postplea motion. Consistent with that intent, the term "or" should be interpreted as "and.

(Defendant was represented by Assistant Defender Nancy Vincent, Springfield.)

People v. Villa, 2011 IL 110777 (No. 110777, 12/1/11)

A court's primary objective in construing a statute is to ascertain and give effect to the intent of the legislature. Intent is determined by reading the statute as a whole and considering all relevant parts. Words and phrases should not be considered in isolation. To the extent that parts of a statute appear to be in conflict, a court must, if possible, construe them in harmony. While an amendment to a statute may give rise to a presumption that the legislature intended to change the law, such a presumption is not conclusive. Where statutory language has acquired a settled meaning through judicial construction and that language is retained in a subsequent amendment, such language is to be understood and interpreted in the same way unless a contrary legislative intent is clearly shown.

The Illinois Supreme Court found no conflict between §150(1)(c) of the Juvenile Court Act (705 ILCS 405/5-150(1)(c)) and **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971). Section 150(1)(c) permits admission of juvenile adjudications for impeachment of witnesses "including the minor or defendant . . . pursuant to the rules of evidence for criminal trials." The **Montgomery** rule prohibits admission of evidence of juvenile adjudications except in limited circumstances to impeach a witness other than an accused.

Courts had interpreted the language "pursuant to the rules of evidence for criminal trials" in the Juvenile Court Act to incorporate the **Montgomery** rule. The legislature retained that language in the present statute, indicating that the present statute also incorporates **Montgomery**'s limitations. The statute's reference to a "minor or defendant" is not meaningless. It incorporates an existing case law exception to **Montgomery**, which allows introduction of a defendant's otherwise inadmissible criminal record where the defendant "opens the door" by attempting to mislead the trier of fact about his criminal background.

The court also rejected the argument that the Juvenile Justice Reform Provisions of 1998 put juvenile adjudications on equal footing to criminal convictions for impeachment purposes. Significant differences still remain between juvenile and criminal proceedings. Rehabilitation is still a more important consideration in juvenile proceedings than in criminal trials.

(Defendant was represented by Assistant Deputy Defender Paul Glaser, Elgin.)

People v. Williams, 235 Ill.2d 178, 920 N.E.2d 446 (2009)

Defendant was convicted of two counts of unlawful use of recorded sounds or images in violation of 720 ILCS 5/16-7(a)(2), and two counts of unlawful use of unidentified sound or audiovisual recordings

in violation of 720 ILCS 5/16-8. The former statute prohibits the intentional, knowing or reckless transfer of sounds or images without the consent of the copyright owner, while the latter statute prohibits the intentional, knowing or reckless distribution of recorded material if the packaging fails to contain the actual name and address of the manufacturer and the names of the performers.

1. The court concluded that §16-7(a)(2), which governs the sale of sound or video recordings without the consent of the owner, has been preempted by federal copyright law. Therefore, the convictions under §16-7 were required to be reversed.

A. Whether a state statute is preempted by federal law is a question of congressional intent. Federal law preempts state law in three situations: (1) where Congress explicitly preempts state action; (2) where Congress has enacted a comprehensive regulatory scheme which impliedly preempts the entire field from State regulation; and (3) where State action conflicts with state law. Federal preemption presents a question of law that is subject to *de novo* review.

B. Whether a State law which creates a criminal offense for copyright infringement has been preempted is determined by a two-part test: (1) whether the work in question is fixed is tangible form and comes within copyright law, and (2) whether the elements of a federal cause of action for copyright infringement are equivalent to the elements of the state crime. Because federal law provides that all equivalent legal rights concerning copyrights fixed after February 15, 1972 are to be governed by federal rather than state law, and because §16-7(a)(2) does not contain an additional element that would make it a non-equivalent claim, the court concluded that §16-7(a)(2) has been preempted by the federal law.

The court rejected the State's argument that Congress intended to preempt only State civil contempt laws, and not state criminal laws.

2. The court concluded, however, that defendant's convictions under §16-8, which requires identification of the manufacturer of audio or sound recordings on the external packaging, were proper. First, §16-8 does not violate due process, because it has a rational relationship to the legitimate public interest of protecting consumers from buying pirated recordings.

Second, §16-8 is not unconstitutionally overbroad as a violation of First Amendment rights. Generally, a person to whom a statute may be constitutionally applied is not permitted to challenge the statute solely on the ground that it may be unconstitutional if applied in other contexts. An exception to this rule is made in First Amendment issues, however, due to the concern that constitutionally protected expression may be deterred by an overbroad statute. Furthermore, conduct which has both speech and "nonspeech" elements may be regulated if the statute furthers a substantial governmental interest that is unrelated to the suppression of free speech, and the incidental restriction of First Amendment concerns is no greater than necessary to further the governmental interest in question.

The court concluded that §16-8 has several factors which significantly narrow its application to the legitimate public interest it is intended to protect. First, the statute requires identification of the manufacturer only if the work is offered in "for profit" transactions. Second, use of a stage or performing name is adequate to comply with the identification requirement of the statute, allowing performers to preserve their anonymity. Under these circumstances, any overbreadth is insignificant in light of the statute's legitimate reach, and any incidental restriction on First Amendment activity is no greater than necessary to further the governmental interest involved.

(Defendant was represented by Assistant Defender Ahmed Kosoko, Chicago.)

People v. Young, 2011 IL 111886 (No. 111886, 12/15/11)

1. When construing a statute, the primary objective is to give effect to the legislature's intent. The most reliable indicator of intent is the plain and ordinary meaning of the statutory language. To determine the plain meaning of statutory terms, the reviewing court may consider the statute in its entirety, the subject addressed, and the legislature's apparent intent. Where the language of a statute is unambiguous, the court must apply the language as written.

Where terms in a statute have acquired a settled meaning through judicial construction, such meaning

is retained in subsequent amendments of the statute unless a contrary intention by the legislature is clearly shown.

2. 720 ILCS 570/407(b)(2) creates a Class 1 felony with a fine of up to $250,000 for committing certain controlled substance offenses "within 1,000 feet of the real property comprising any school." Defendant was charged with delivery of a controlled substance within 443 feet of the "High Mountain Church and Preschool," which was not described in the record other than by its name.

The Supreme Court reduced the conviction to simple delivery of a controlled substance, finding that the settled meaning of the term "school" is limited to a "public or private elementary or secondary school, community college, or university."

(Defendant was represented by Assistant Defender Holly Schroetlin, Chicago.)

In re Davontay A. and Donavon A., 2013 IL App (2d) 120347 (Nos. 2-12-0347 & 2-12-0376, 12/30/13)

1. Where the language of a statute is clear, the statute must be applied as written without resort to any rules of construction. 730 ILCS 5/5-9-1.7(b)(1) provides that in addition to any other penalty, a $200 fine "shall be imposed upon any person who pleads guilty or who is convicted of, or who receives a disposition of court supervision for, a sexual assault or attempt of a sexual assault." The court concluded that under the plain language of the statute, minors who were adjudicated delinquent after an adjudicatory hearing are not subject to the fine. Therefore, the sexual assault fines must be vacated.

2. The court added that its conclusion would be the same even if §5-9-1.7(b)(1) was determined to be ambiguous. Under the statutory rule of construction known as *expressio unius est exclusio alterius*, when the legislature includes a listing of things to which a statute applies, there is an inference that things which were omitted from the list were intended to be excluded from the statute. Because the legislature did not include persons who were adjudicated delinquent after an adjudicatory hearing in the list of persons subject to the fine, it should be inferred that the such persons were intended to be excluded from the statute.

(Defendant was represented by Assistant Defender Barb Paschen, Elgin.)

In re M.I., 2011 IL App (1st) 100865 (No. 1-10-0865, 12/23/11)

1. Whether a statutory command is mandatory or directory is a question of statutory construction. The principal rule of statutory construction is to give effect of the intent of the legislature. Mandatory and directory provisions are both couched in obligatory terms, but differ in that non-compliance with a mandatory provision voids the governmental action in question, while non-compliance with a directory provision does not have the same effect. In determining whether a statute is mandatory or directory, the term "shall" is not determinative.

Statutory language creating a procedural command to a government official is presumed to be directory rather than mandatory. However, this presumption is overcome by negative language prohibiting further action in the event of non-compliance with the statute or where the right intended to be protected by the statute would be injured if the statute was given a directory reading.

2. 705 ILCS 405/5-810(2) provides time limits for a hearing on the State's motion to designate a juvenile proceeding as an extended juvenile jurisdiction proceeding. Under §810(2), the trial court "shall" conduct a hearing within 30 days after the motion is filed, or within 60 days upon a showing of good cause for the delay.

The Appellate Court concluded that the time limitation was intended to be directory only, noting that the provision neither prohibits the trial court from conducting a hearing on the motion if the specified time frames are not honored nor requires dismissal of the motion if a timely hearing is not held. The court also found that the right in question - the right of the minor respondent to receive a hearing before being subjected to an EJJ proceeding and a stayed adult sentence - is not affected by the mere failure to hold a hearing within the specified time limits. The court acknowledged, however, that the minor could show prejudice from the failure to hold a timely hearing if the delay resulted in a different conclusion than would have been the case had the hearing been timely.

3. The minor, who was adjudicated delinquent under the EJJ statute and given both a juvenile sentence and a stayed adult sentence to be imposed only if he failed to successfully complete the juvenile sentence, lacked standing to challenge the constitutionality of the EJJ statute. The minor claimed that the statute was unconstitutionally vague because it lacked sufficient notice of the conduct which would result in violation of the juvenile sentence and imposition of the stayed adult sentence. The minor also claimed that the statute lacked sufficient guidelines for the trial court to determine whether the juvenile sentence should be revoked.

A party has standing to challenge the constitutionality of a statute only if he has sustained or is in danger of sustaining a direct injury as a result of the statute. Because there had been no allegation that the respondent had violated the juvenile sentence and no reason to believe that the stayed adult sentence would ever be imposed, the court concluded that the challenge was premature. Thus, defendant lacked standing to challenge the constitutionality of the statute until such time as he was required to serve the adult sentence.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

Mitchell v. People, 2016 IL App (1st) 141109 (Nos. 1-14-1109 & 1-15-0816, cons., 3/31/16)

The Torture Inquiry and Relief Commission Act (720 ILCS 40) established a commission to investigate claims of torture. A "claim of torture" is a defendant's claim that he was tortured into confessing to a crime and "there is some credible evidence related to allegations of torture by Commander Jon Burge or any officer under the supervision of Jon Burge." 720 ILCS 40/5(1).

Although Burge had been fired by the time the defendants were interrogated, the court held that their cases fell within the jurisdiction of the Act since they alleged that they were tortured by officers who had previously served under Burge's supervision. The court found that the language of the Act was ambiguous and susceptible of two reasonable interpretations. On the one hand, the phrase "related to allegations" of torture by Burge or those he supervised could be interpreted to include claims of torture by officers formerly under his command. On the other hand, the phrase "under the supervision of" could be interpreted as only encompassing claims of torture by Burge or officers presently under his command at the time the torture took place.

When faced with an ambiguous statute, courts will give substantial weight and deference to the interpretations of the agency charged with administering the statute, even though courts are not bound by such interpretations. Here the committee issued an order concerning its jurisdiction and proposed regulations specifically finding that its jurisdiction included allegations of torture by officers who were previously supervised by Burge.

The court deferred to the committee's clear interpretation of its jurisdiction and reversed the trial court ruling that the claims fell outside the Act's jurisdiction. The cases were remanded for further proceedings in accordance with the Act.

People v. Bethel, 2012 IL App (5th) 100330 (No. 5-10-0330, 8/31/12)

1. To determine whether a statutory amendment is retroactive, a court initially determines whether the legislature has expressly stated the temporal reach of amendment. If the legislature has done so, the expression of the legislature must be given effect absent a constitutional prohibition.

If the legislature has not clearly stated the temporal reach of the amendment, a court must next determine whether applying the amendment would have a retroactive impact. To make this determination, a court considers whether the retroactive application of the amendment impairs rights a party possessed while acting, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed.

The Statute on Statutes provides a clear legislative directive as to the temporal reach of an amendment where none is expressly stated. Statutory amendments that are procedural may be applied retroactively, while amendments that are substantive may not. 5 ILCS 70/4. If retroactive application has inequitable consequences, the court will presume that the statute does not govern the case.

2. The Sexually Violent Persons Commitment Act contains an amendment that tolls the running of an MSR term upon the filing of a sexually violent persons petition until the petition is dismissed, or a finding is made that the inmate is not a sexually violent person, or the inmate is discharged by the court as no longer sexually violent. 725 ILCS 207/15(e). This amendment was adopted after defendant pleaded guilty, but before he was due to be released on MSR.

The amendment does not expressly state that it applies retroactively, and there is no legislative directive as to the temporal reach of the amendment. The purpose of the amendment is to suspend the running of the MSR term to ensure that the inmate will be subject to intensive supervision upon release. There is nothing in the statute excusing an inmate from complying with the terms and conditions of MSR while the running of the MSR term is tolled. Application of the tolling provision has a definite, immediate, and substantive effect on the length of an inmate's MSR term, and is therefore substantive.

Because the tolling provision is substantive, the Appellate Court presumed that it would not apply retroactively to defendant who was admonished when he pleaded guilty that he would be subject to a three-year MSR term upon completion of his sentence. Assuming for the sake of argument that the tolling provision does apply to defendant, the Appellate Court presumed that the legislature did not intend for defendant to be bound by the terms and conditions of MSR and subject to revocation of MSR during the period of his commitment as a sexually violent person.

Because defendant's post-conviction claim that his guilty pleas were not knowing and voluntary and that he was subject to *ex post facto* punishment was dependent on the retroactivity of the tolling provision, the Appellate Court affirmed the dismissal of defendant's post-conviction petition as frivolous.

(Defendant was represented by Assistant Defender Robert Burke, Mt. Vernon.)

People v. Bohannon, 403 Ill.App.3d 1074, 936 N.E.2d 143 (5th Dist. 2010)

Specific terms covering the given subject matter prevail over general language of the same or another statute that might otherwise prove controlling.

Defendant was charged with obstructing a peace officer based on his refusal to produce his driver's license and proof of insurance when stopped by the police at a random safety checkpoint. The act that the police officer was authorized to perform and that defendant resisted were the same exact acts that the defendant was required to perform at the request of a law enforcement officer by the Illinois Vehicle Code. Because the acts of resistence and obstruction were subsumed in the provisions of the Illinois Vehicle Code, defendant could not be prosecuted for obstruction of a peace officer.

The Appellate Court affirmed the circuit court's dismissal of the charge.

(Defendant was represented by Assistant Defender John Gleason, Mt. Vernon.)

People v. Borys, 2013 IL App (1st) 111629 (No. 1-11-1629, 8/23/13)

The State Police Act required the Department of State Police to install in-car video camera recording equipment in all patrol vehicles by June 1, 2009. 20 ILCS 2610/30(b). The Act provides that any enforcement stop resulting from a suspected violation of the Illinois Vehicle Code shall be video and audio recorded. 20 ILCS 2610/30(e). The Department of State Police is required to retain the recordings for at least 90 days. 20 ILCS 2610/30(f). The officer operating the patrol vehicle is required to report any problems with the recording equipment to his commander, who must make every reasonable effort to correct and repair the equipment, and determine if it is in the public interest to permit the use of the patrol vehicle. 20 ILCS 2610/30(h).

Defendant was arrested for DUI by a state trooper whose vehicle was not equipped to make recordings as mandated by statute. The Appellate Court rejected defendant's argument that as a sanction for violating the statute, the officer should not have been permitted to testify to the events of the traffic stop. Nothing in the language of the statute indicates that an officer's testimony is inadmissible if his patrol vehicle does not have the required recording equipment. The lack of recording equipment had been documented with his superiors, who under the Act had the discretion to determine if it was in the public interest to permit the

use of a patrol vehicle whose recording equipment was defective. The provision requiring preservation of any recording was not violated where no recording was made.

A statute is presumed to be directory rather than mandatory, and no particular consequence follows from noncompliance, unless (1) there is negative language prohibiting further action in the case of noncompliance, or (2) the right that the provision is designed to protect would generally be injured under a directory reading. Neither condition applies here. The Act lacks negative language prohibiting further action if the Department of Police does not comply with the July 2009 deadline. Nor would a directory reading of the statute injure the defendant's right to a fair trial because the legislature envisioned that all traffic stops would not be recorded where the statute provides the Department of State Police with discretion to permit use of vehicles despite recording deficiencies. Therefore, the presumption that the statute is directory has not been overcome.

(Defendant was represented by Assistant Defender Patrick Morales-Doyle, Chicago.)

People v. Burk, 2013 IL App (2d) 120063 (Nos. 2-12-0063 & 2-12-0064 cons., 8/30/13)

A court's task in interpreting a statute is to give effect to the legislative intent. If a statute is capable of two interpretations, a court should give it the one that is reasonable and that will not produce an absurd, unjust, unreasonable, or inconvenient result that the legislature could not have intended.

The Illinois Eavesdropping Act exempts "[r]ecordings of utterances made by a person while in the presence of a uniformed peace officer and while an occupant of a police vehicle." 720 ILCS 5/14-3(h-5).

The dictionary definition of "presence" is "in the vicinity of or in the area immediately near." Nothing in the Act indicates a legislative intent to ascribe any meaning to the term "presence" different from its commonly understood meaning. Therefore, "in the presence" of an officer means in the vicinity of or immediately near an officer. Nothing in the statute supports an interpretation requiring that the officer be inside the squad car when the statement is recorded. Had the legislature so intended, it would have used more limiting language. The court refused to read into the statute a limitation that was not expressed.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Chambers, 2013 IL App (1st) 100575 (No. 1-10-0575, 8/13/13)

The Appellate Court rejected the State's argument that Illinois Supreme Court Rule 137, which provides that the signature of an attorney or a party constitutes a certificate that he or she believes that the allegation is warranted by existing law or a good faith argument for the extension of existing law and authorizing an appropriate sanction where a document is signed in violation of the rule, authorizes a ban on filing post-conviction petitions until court costs for prior petitions have been paid. The court noted that 735 ILCS 5/22-105, which provides that the inability to pay court costs does not bar a petitioner from filing a post-conviction petition, is a specific provision addressing frivolous filings by prisoners, while Rule 137 is a general rule governing the filing of all documents. Because a specific statutory provision prevails over a general provision, §22-105 permits the filing of a post-conviction petition even where the petitioner has not paid previous court costs.

(Defendant was represented by Assistant Defender Manuel Serritos, Chicago.)

People v. Davis, 2012 IL App (2d) 100934 (No. 2-10-0934, 3/29/12)

The primary goal in statutory construction is to ascertain and give effect to the intent of the legislature. The first step is to examine the language of the statute, which is the surest and most reliable indicator of legislative intent. Where the language is clear, the statute may not be revised to include exceptions, limitations or conditions that the legislature did not express. If the legislature uses certain language in one part of a statute and different language in another, the assumption is that different meanings were intended.

The criminal code provides that "[a] person commits the offense of criminal trespass to a residence when, without authority, he or she knowingly enters the residence of another and knows or has reason to

know that one or more persons is present or he or she knowingly enters the residence of another and remains after he or she knows or has reason to know that one or more persons is present." 720 ILCS 5/19-4(a)(2).

This statute does not require that the State prove that the defendant knew that he lacked authority to enter the residence. By using the word "knowingly" directly before "enters the residence of another," the legislature made apparent its intent to require that the entry be knowing. Similarly, the legislature specified that the State prove that the defendant "knows or has reason to know that one or more persons is present." The legislature did not, however, place any words before or around "without authority" indicating an intent that the defendant's lack of authority be knowing. By not specifically requiring that the defendant knew that he lacked authority, when it specifically required defendant's knowledge of two other elements, the legislature made clear its intent that the without-authority element need not be knowing.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

People v. Ebelechukwu, 403 Ill.App.3d 62, 937 N.E.2d 222 (1st Dist. 2010)

Whether state law is preempted by federal legislation is a question of law that is reviewed *de novo*. Legislative intent, either express or implied, determines whether federal law preempts state law. Congress may explicitly mandate preemption of state law. Absent an expressed intent, intent to preempt state law may be inferred in two situations. First, field preemption is implied where the scheme of federal legislation is so pervasive as to support a reasonable inference that Congress left no room for the States to supplement it. Second, conflict preemption arises where: 1) compliance with federal and state regulation is a physical impossibility; or 2) state law creates an obstacle or otherwise impedes the accomplishment and execution of the full purposes and objectives of federal law.

At issue is whether the federal Trademark Counterfeiting Act (18 U.S.C. §2320(a)) preempts prosecution of defendant under the Illinois Counterfeit Trademark Act (765 ILCS 1040/2).

1. The court finds no express preemption because nothing in the federal statute explicitly provides for preemption.

2. The court agrees with the consensus of federal and state authority that federal law does not create a full-scale regulatory scheme of the sort that would support an inference of field preemption.

3. The court finds no conflict preemption. First, it is not physically impossible for individuals to comply with federal and Illinois law as both outlaw trafficking in counterfeit goods. Second, while federal law provides affirmative defenses that Illinois does not, the question is not whether any conceivable inconsistency exists between federal and Illinois law, but whether federal law is compromised by Illinois law or Illinois law conflicts with federal objectives. The court finds that Illinois law furthers the federal objective of protecting trademark holders and penalizing those who infringe on trademarks by trafficking in counterfeit goods.

The Appellate Court reversed the circuit court's order dismissing the indictment and remanded for further proceedings.

People v. Freeman, 404 Ill.App.3d 978, 936 N.E.2d 1110 (1st Dist. 2010)

When the plain language of one statute conflicts with the plain language of another, courts must look beyond the plain language of the statute to determine legislative intent, which is paramount. The legislature is presumed to know of existing statutes when it enacts new statutes. It cannot be presumed that the legislature would enact a law that completely contradicts an existing law, thereby repealing the existing law by implication. The court must construe the statutes together, *in pari materia*, where such interpretation is reasonable.

At issue in this case were the rape shield statute, 725 ILCS 115-7 and 725 ILCS 5/115-13, which codified a hearsay exception for the admission of statements of victims of sex offenses to medical personnel. The rape shield statute prohibits admission of evidence of the prior sexual activity or reputation of the victim of a sexual assault with two limited exceptions. The hearsay exception contained in §115-13 allows statements made by sexual assault victims to medical personnel for the purpose of diagnosis or treatment to

be admitted as substantive evidence.

The ER physician who treated the alleged victim testified that she told him that she had never had sex before. Based on that information, he expected to find a fully intact hymen when he examined her, but found a one millimeter tear in the hymen, which was consistent with a sexual assault. The court concluded that the admission of this evidence violated the rape shield statute, but was admissible under the hearsay exception of §115-13.

To resolve this conflict and determine whether error occurred, the court looked to the purpose of each statute to determine if they could be construed together so as not to offend the purpose of either statute. The purpose of the rape shield statute is to prevent harassment and abuse of sexual assault victims where their sexual history is irrelevant to whether they consented to sexual contact with the accused. The hearsay exception of §115-13 codifies a common law hearsay exception for statements to treating physicians that are relevant and reliable. The court concluded that the admission of the hearsay statements comported with both statutes because the evidence was relevant to whether there was a sexual assault, but did not harass the alleged victim.

The Appellate Court found no error in the admission of the evidence and affirmed defendant's conviction for predatory criminal sexual assault.

(Defendant was represented by Assistant Defender Brian McNeil, Chicago.)

People v. Gay, 2011 IL App (4th) 100009 (No. 4-10-0009, 11/18/11)

The Illinois Administrative Code establishes a scheme for punishing DOC inmates who violate internal disciplinary rules. As an independent penal mechanism, nothing in the Code prevents an inmate from facing disciplinary charges and state criminal charges for a single unlawful act.

Offense No. 501 of the Code defines "violating state or federal laws" as "committing any act that would constitute a violation of state or federal law," and provides that "[i]f the specific offense is stated elsewhere in this Part, an offender may not be charged with this offense except as otherwise provided in this Section." 20 Ill. Adm. Code 504 app. A. Under this provision, a prisoner may not be cited for this offense unless either: (1) no other disciplinary offense is implicated by the offender's behavior; or (2) another section in the table of offenses allows citation of both offenses.

Defendant received a citation for offense No. 102, assaulting any person, rather than for offense No. 501, violating state or federal laws. The court rejected the argument that because defendant was not cited for a violation of offense No. 501, he could not be subject to criminal prosecution. The legislature could not have intended the absurd result that disciplinary offenses that constitute crimes may not be charged as offense No. 501, and that disciplinary offenses not charged as offense No. 501 may not be prosecuted as crimes.

(Defendant was represented by Assistant Defender Scott Main, Chicago.)

People v. Gillespie, 2012 IL App (4th) 110151 (No. 4-11-0151, 8/29/12)

An unconstitutional amendment to a statute is void *ab initio*. The effect of enacting an unconstitutional amendment to a statute is to leave the law in force as it was before the adoption of the amendment. The void amendment is not validated by a subsequent amendment of a different statute, even if it alters the statutory scheme to address the unconstitutional amendment.

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Illinois Supreme Court held that the penalty for armed robbery while armed with a firearm violated the proportionate-penalties clause because it was more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon. Armed robbery with a firearm was a Class X offense punishable by a term of 6 to 30 years' imprisonment with a mandatory 15-year add-on, for a total of 21 to 45 years, while armed violence carried a penalty of only 15 to 30 years' imprisonment.

P.A. 95-688 subsequently amended the armed violence statute so as to make it impossible to base an armed violence conviction on robbery. The amendment did not alter the 15-year enhancement for armed robbery committed with a firearm that had been found unconstitutional in **Hauschild**.

Disagreeing with the conclusion reached by the court in **People v. Brown**, 2012 IL App (5th) 100452, the Appellate Court concluded that the armed-violence statute did not revive the 15-year enhancement. Even though the effect of P.A. 95-866 was to change the statutory scheme to remedy the proportionate-penalties violation, it left the armed-robbery statute unchanged and therefore could not validate the void statute.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Haase, 2012 IL App (2d) 110220 (No. 2-11-0220, 8/8/12)

The primary goal in statutory construction is to ascertain and give effect to the intent of the legislature. In doing so, a court must assume that the legislature did not intend an absurd or unjust result. The first step is to examine the language of the statute, which is the most reliable indicator of legislative intent. Words in a statute are given their ordinary and commonly understood meaning if the statute does not provide a definition indicating a contrary legislative intent. Where the language is plain, exemptions, limitations and conditions should not be read into the statute.

The Liquor Control Act forbids the consumption of alcoholic liquor by any person under 21 years of age, but contains a parental-supervision exemption for consumption "under the direct supervision and approval of the parents or parent or those persons standing in loco parentis of such person under 21 years of age in the privacy of the home." 235 ILCS 5/6-20(g).

This exemption does not require that the parent directly supervise the minor until all of the alcohol has been completely metabolized. The language of the statute is plain in requiring the direct supervision of the *consumption* of alcohol. It says nothing about the necessity of parental supervision once the consumption is done. To interpret the exemption to require parents to supervise until the alcohol has completely metabolized would be to read into the statute a requirement that the legislature did not express. Requiring the parent to supervise until the alcohol has metabolized would require an absurd result as it would require the parent to have the training and equipment to administer a breath test. Any concerns about a minor's behavior after consuming alcohol are addressed by numerous other statutes and ordinances.

Because the undisputed evidence was that the defendant consumed one glass of an alcoholic beverage with the approval and under the direct supervision of his mother, the Appellate Court reversed defendant's conviction for consumption of alcohol by a minor that was based on evidence that he had a blood alcohol concentration of .036 while helping a friend whose truck had broken down.

(Defendant was represented by Assistant Defender Kim DeWitt, Elgin.)

People v. Henderson, 2013 IL App (1st) 113294 (No. 1-11-3294, 12/17/13)

Whether an unconstitutional portion of a statute can be severed from the rest of the statute involves a question of statutory construction, which requires ascertaining and giving effect to the intent of the legislature. Generally, an invalid portion of a statute may be severed if the remaining portions can be given effect in the absence of the invalid provision.

Severability is determined by a two-part inquiry. First, the court must determine whether the valid and invalid portions of the statute are essentially and inseparably connected in substance. Second, the court must determine whether the legislature would have enacted the valid portions without also enacting the invalid portions.

(Defendant was represented by Assistant Defender Peter Sgro, Chicago.)

People v. Higgenbotham, 2012 IL App (1st) 110434 (No. 1-11-0434, 6/28/12)

Under the doctrine of *in pari materia*, two statutes must be considered with reference to each other to allow for a harmonious interpretation of the relevant provisions, and words and phrases should be construed with reference to the other relevant provisions and not in isolation.

725 ILCS 5/114-4 provides that a continuance allowed due to the physical incapacity of defendant "shall suspend" the running of a speedy-trial term, "which period of time limitation shall commence anew"

when the court determines that the physical incapacity no longer exists. 725 ILCS 5/5-114-4(i). Use of the word "suspend" in §114-4(i) suggests a mere interruption of defendant's speedy-trial demand when defendant becomes physically incapacitated. But inclusion of the phrase "commence anew" suggests that the demand ends.

The intent of the legislature is more clearly revealed by referring back to the speedy-trial statute, 725 ILCS 5/103-5, which also uses the word "suspend" and makes clear that "suspend" means a delay occasioned by defendant that merely tolls the speedy-trial term. The only logical interpretation of these two statutes is that the speedy-trial term tolls when defendant obtains a continuance due to physical incapacity, and then continues from the date at which it was stopped when the physical incapacity is removed.

People v. Hill, 402 Ill.App.3d 903, 934 N.E.2d 43, 2010 WL 2675077 (1st Dist. 2010)

Supreme Court Rule 416(c) provides that the prosecution shall provide notice of its intention to seek the death penalty "as soon as practicable," but "[i]n no event shall the filing of such notice be later than 120 days after arraignment, unless for good cause shown, the court directs otherwise."

1. The construction of supreme court rules is governed by the same rules governing the construction of statutes. A court will apply the clear and unambiguous language of a rule as it is written to determine if an obligation imposed by the rule is mandatory or permissive.

2. If the obligation is mandatory, the dispositive issue is the consequence of the failure to comply with the obligation, the answer to which depends on whether the rule is mandatory or directory. The Appellate Court acknowledged that the Illinois Supreme Court has not yet spoken on the question of whether its rules are mandatory or directory. In construing statutes, a presumption exists that language issuing a procedural command to a government official indicates an intent that the rule is directory. That presumption is overcome by language prohibiting further action in the event of non-compliance, or if the right protected by the statute is injured by a directory reading.

Applying these rules of construction to Rule 416(c), the Appellate Court concluded that although the obligation imposed by Rule 416(c) is mandatory by the plain language of the rule, the rule is directory. The rule contains no language prohibiting further action in the event of non-compliance. The rule is intended to improve trial administration, promote better preparation for capital trials, and limit the use of resources to actual capital cases. Although a defendant's rights might be injured by non-compliance, defendant suffered no injury as he was afforded all of the protections available to a capital defendant, despite the State's neglect to comply with the rule.

(Defendant was represented by Assistant Defender Steven Becker, Chicago.)

People v. Horsman, 406 Ill.App.3d 984, 943 N.E.2d 139 (2d Dist. 2011)

The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature. When the statutory language is clear and unambiguous, it must be applied without the use of others aids to construction. If the statute is capable of being understood by reasonably informed persons in two or more different ways, the statute will be deemed ambiguous, and the court may consider extrinsic aids of construction to discern legislative intent.

Anyone convicted of a fourth or subsequent violation of driving on a revoked license must serve a minimum of 180 days' imprisonment if the revocation was due to a conviction for DUI or leaving the scene of an accident involving death or personal injury. 625 ILCS 5/6-303(d-3). The statute does not define "imprisonment," and defendant argued that the term should be construed to include electronic home monitoring.

The dictionary definition of "imprisonment" is the act or state of being put in prison or confined in jail. The Unified Code of Corrections defines imprisonment as incarceration in a correctional institution under a sentence of imprisonment, not including periodic imprisonment. 730 ILCS 5/5-1-10. Supporting the conclusion that electronic home monitoring is a form of imprisonment, the Electronic Home Detention Law allows certain individuals serving terms of imprisonment in a correctional institution to be released on

electronic home monitoring under specified conditions and circumstances. 730 ILCS 5/5-8A-3. Courts have also considered persons released on electronic home monitoring to be in DOC custody so as to qualify for sentencing enhancements for offenses committed while imprisoned. Therefore, "imprisonment" as used in §6-303(d-3) is an ambiguous term, and extrinsic aids must be used to determine whether the requirement of imprisonment may be satisfied by electronic home monitoring.

The legislative history of §6-303(d-3) indicates the legislature's belief that those who repeatedly drive on revoked licenses pose such a threat that they need to be "locked up." Courts have also noted the freedoms available to persons on electronic home monitoring as compared to incarcerated persons, and found that persons on monitoring are not being punished, but are on a period of supervised transition to free society. Even if considered punishment, electronic home monitoring is not the equivalent of incarceration. Therefore, it would be inconsistent with the intent of the legislature to allow a repeat offender such as defendant to have available the relative nonpunishment of electronic home monitoring in lieu of incarceration in a penal institution. The rule of lenity does not require a court to interpret a statute so rigidly as to defeat the intention of the legislature.

(Defendant was represented by Assistant Defender Christopher White, Elgin.)

People v. Isaacson, 409 Ill.App.3d 1079, 950 N.E.2d 1183 (4th Dist. 2011)

The last-antecedent doctrine, a long-recognized grammatical canon of statutory construction, provides that "relative or qualifying words, phrases, or clauses are applied to the words or phrases immediately preceding them and are not construed as extending to or including other words, phrases, or clauses more remote, unless the intent of the legislature, as disclosed by the context and reading of the entire statute, requires such extension or inclusion."

The punishment for driving on a suspended license is increased to a Class 4 felony when a person is convicted of a violation of the driving-while-license-suspended statute "during a period of summary suspension imposed pursuant to Section 11-501.1 when the person was eligible for a MDDP [monitoring device driving permit]." 625 ILCS 5/6-303(c-3).

Applying the last-antecedent doctrine, the phrase "when the person was eligible for a MDDP" is closer to "imposed" than "violation," and clearly does not apply to the "pursuant to" phrase. Therefore, subsection c-3 applies to individuals who are convicted of driving on a suspended license when the individual was eligible for an MDDP at the time that the suspension was imposed, rather than at the time of the violation.

Had the legislature intended that the eligibility exist at the time of the violation, it could have included the phrase "at the time of the offense," to indicate that the aggravating factor had to exist at the time of the violation, as it did in describing another aggravating factor in 625 ILCS 5/3-606(c-4).

This interpretation is also consistent with the purpose of MDDPs, which is to provide driving privileges in a manner consistent with public safety. 625 ILCS 5/6-206.1. The statute punishes those who had the opportunity to get an MDDP and drive in a manner consistent with public safety, but drove anyway during the period of suspension without one. It would be absurd to exempt from this punishment those who lost the ability to obtain an MDDP by the time of the violation, allowing them to receive a less severe punishment than those who did not lose the privilege.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

People v. Kayer, 2013 IL App (4th) 120028 (No. 4-12-0028, 5/6/13)

When interpreting a statute, the court's duty is to ascertain and give effect to the intent of the legislature. The most reliable indicator of the intent of the legislature is the language of the statute, which is to be given its plain, ordinary, and popularly understood meaning. Courts should also consider the statute in its entirety, keeping in mind the subject it addresses and the legislature's apparent objective in enacting it.

The Sex Offender Registration Act provides that if a sex offender "changes" his "place of

employment," he shall report his "change in employment . . . within the time period specified in Section 3." 730 ILCS 150/6. Section 3 provides that the sex offender shall register in person within three days of "establishing . . . a place of employment." 730 ILCS 150/3(b).

The Appellate Court concluded that the Act does not require a sex offender to report a loss of employment. This interpretation is supported by the legislature's use of the word "change," the plain and ordinary meaning of which is "to replace with another." It is impossible for a sex offender who loses his job to report a change of his "place of employment"within the time period of §3, as that period of time begins to run only after he has established his new place of employment. The Registration Act requires a sex offender who loses his fixed place of residence to report that loss, but contains no comparable language with respect to employment. Not requiring a report of loss of employment is consistent with the purpose of the Act, which is to enable law enforcement to keep track of sex offenders. Loss of employment does not require law enforcement to track an offender at a new location.

(Defendant was represented by Assistant Defender Marty Ryan, Springfield.)

People v. Kucharski, 2013 IL App (2d) 120270 (No. 2-12-0270, 3/29/13)

1. 720 ILCS 135/1-2(a)(1) creates the offense of harassment through electronic communications where electronic communications are used to make an "obscene" comment "with an intent to offend." The court rejected the argument that the statute violates the First Amendment because it is a content-based limitation which prohibits only obscene speech which is intended to offend, and not any other obscene speech.

The court found that §1-2(a)(1) is an attempt to regulate conduct which accompanies prohibited speech, and does not seek to regulate speech itself. Although speech may not be constitutionally proscribed because of the ideas it expresses, it may be restricted "because of the manner in which it is communicated or the action it entails." Because §1-2(a)(1) restricts obscene electronic communications due only to the purpose for which the communication is transmitted, and not because of the ideas that are expressed, the statute is constitutional.

2. The court rejected the argument that a communication is "obscene" under §1-2(a)(1) only if it satisfies the definition of "obscenity" established in **Miller v. California**, 413 U.S. 15 (1973) and embodied in the Illinois obscenity statute (720 ILCS 5/11-20(b)). The court concluded that **Miller** and §11-20(b) were intended to provide a definition of "obscene" for purposes of controlling the commercial dissemination of obscenity. Because the legislature did not intend to apply the definition of §11-20(b) to the electronic harassment statute, the court concluded that the ordinary dictionary definition of "obscene" should be employed. Thus, for purposes of the electronic harassment statute, the term "obscene" is defined as "disgusting to the senses" or "abhorrent to morality or virtue."

3. The court rejected the argument that 720 ILCS 135/1-2(a)(2) is unconstitutionally vague and overbroad on its face. Section 1-2(a)(2) creates the offense of harassment through electronic communications for interrupting, "with the intent to harass, . . . the electronic communication service of any person."

A criminal law may be declared unconstitutionally vague because it fails to provide sufficient notice to enable a person of ordinary intelligence to understand what conduct is prohibited, or because it fails to provide sufficient standards to avoid arbitrary enforcement. To prevail on a vagueness challenge to a statute that does not infringe on First Amendment rights, the defendant must establish that the statute is vague as applied to the conduct for which he or she is being prosecuted. A statute that does not impact First Amendment rights will be declared unconstitutionally vague only if it is incapable of any valid application.

The court concluded that the harassment through electronic communication statute prohibits conduct rather than speech, and does not affect First Amendment rights. Therefore, the statute is not unconstitutional on its face. The court also rejected the argument that the statute is vague because the term "interrupt" is undefined, concluding that when the term is given its ordinary dictionary meaning the statute is sufficient to give adequate notice and prevent arbitrary enforcement.

The court also rejected the argument that the electronic harassment statute violates the First

Amendment because it restricts speech that is merely "annoying." The court concluded that to come within the scope of the word "harass," the interruption must be made "with the intent to produce emotional distress or discomfort substantially greater than mere annoyance."

4. 720 ILCS 5/16D-5.5(b)(1) provides that a person "shall not knowingly use or attempt to use encryption" to "commit, facilitate, further, or promote any criminal offense." The term "encryption" is defined as the use of "any protective or disruptive measure, including, without limitation, cryptography, enciphering, encoding, or a computer contaminant," to prevent, impede, delay or disrupt access to data, to make data unintelligible or unusable, or to prevent, impede, delay or disrupt the normal operation or use of a component or device.

The court concluded that §5/16D-5.5(b)(1) is intended to apply only where the defendant engages in "some type of data transformation, manipulation, or destruction." Merely changing the password on another's social media account does not fall within this definition. Thus, defendant's conviction for unlawful use of encryption, which was based on changing his former girlfriend's password to her MySpace account, was reversed.

People v. Larson, 2015 IL App (2d) 141154 (No. 2-14-1154, 9/23/15)

1. A defendant who commits possession of a firearm without a valid firearm owner's identification (FOID) card (430 ILCS 65/2(a)(1)), is guilty of a Class A misdemeanor if he does not possess a currently valid FOID card "but is otherwise eligible" to obtain one. 430 ILCS 65/14(b). He is guilty of a Class 3 felony if he does not possess a currently valid FOID card and "is not otherwise eligible" to obtain one. 430 ILCS 65/14(c)(3). He is also guilty of a Class 3 felony if his FOID card is "revoked." 430 ILCS 65/14(c)(1).

2. An order of protection was entered against defendant with an expiration date of February 14, 2011. As a result of the order of protection, the Illinois State police revoked defendant's FOID card. On February 14, 2011, officers discovered defendant in possession of firearm. On that date, the order of protection had expired, so defendant was eligible to obtain a new FOID card, but had not yet done so. Defendant was convicted of a Class 3 felony under section 14(c)(1) since his FOID card was revoked.

Defendant argued on appeal that because he was eligible to obtain a FOID card at the time the firearm was discovered, he should have been convicted of a Class A misdemeanor under section 14(b), failing to possess a FOID card but eligible to obtain one. Defendant argued that both section 14(b) and 14(c)(1) applied to his case, and thus under the rule of lenity, the more lenient interpretation of the statute should be used.

3. The Appellate Court rejected defendant's argument. The court held that using the proper tools of statutory construction, it was clear that section 14(c)(1) applied to defendant, not section 14(b). Since the statute was not ambiguous, the rule of lenity did not apply.

First, each provision of a statute must be interpreted in light of the statute as a whole, and the statute must be construed to avoid rendering specific language superfluous or meaningless. Using these canons of interpretation, the court determined that defendant's argument would improperly render the word "revoked" in section 14(c)(1) meaningless.

Section 14(b) provides for situations where a defendant has no FOID card but is eligible to obtain one. Section 14(c)(3) provides for situations where a defendant has no FOID card and is not eligible to obtain one. Under defendant's interpretation, the only salient consideration in determining whether the offense is a misdemeanor or a felony is whether defendant is eligible to obtain a FOID card. But if that were the case, then sections 14(b) and 14(c)(3) would be entirely dispositive of the outcome, and the "revoked" language of section 14(c)(1) would be rendered meaningless. Instead, the statute treats a revoked FOID card more seriously than a non-possessed FOID card and punishes the former more severely.

Second, a statutory provision that is particular and relates to only one subject prevails over a provision that is general and applies to cases generally. Section 14(b) applies to the general category of cases where a defendant does not possess a FOID card. Section 14(c)(1) by contrast applies to the narrower subset of cases where a FOID card has been revoked. Accordingly, section 14(c)(1) is controlling.

Defendant's conviction and sentence were affirmed.

People v. Lashley, 2016 IL App (1st) 133401 (No. 1-13-3401, 6/30/16)

If the defendant was "in the custody of the Department of Corrections" when he committed an offense, the sentence shall be served consecutively to the sentence under which he was "held" in custody. 730 ILCS 5/5-8-4(d).

Defendant was sentenced to Cook County's impact incarceration program, which lasts from 120 to 180 days, followed by a mandatory term of monitored release. 730 ILCS 5/5-8-1.2. When defendant committed the current offense, he was on monitored release from the impact incarceration program. The trial court ordered the sentence for the current offense to run consecutive to the impact incarceration sentence.

The Appellate Court held that the consecutive sentences were improper. The court found that it was ambiguous whether section 5-8-4(d) applied to defendant and thus under the rule of lenity the statute had to be interpreted in defendant's favor. The statute's applicability was ambiguous for two reasons. First, the phrase "in the custody of the Department of Corrections" could reasonably refer only to the Illinois Department of Corrections, not a Cook County impact program. Second, the word "held" could reasonably exclude a defendant on monitored release.

Under the rule of lenity, ambiguous criminal statutes will generally be construed in a defendant's favor. Since section 5-8-4(d) was ambiguous as applied to defendant, the rule of lenity required that the construction of the statute favoring defendant must be applied, making consecutive sentences inapplicable.

The trial court's mistaken belief that consecutive sentences were required constituted second prong plain error because the right to be lawfully sentenced is a substantial right. The case was remanded for resentencing to concurrent terms.

(Defendant was represented by Assistant Defender Mike Orenstein, Chicago.)

People v. Lattimore, 2011 IL App (1st) 093238 (No. 1-09-3238, 9/2/11)

A person commits aggravated battery if he "[k]nowingly and without lawful justification and by any means causes bodily harm to a merchant who detains the person for an alleged commission of retail theft. 720 ILCS 5/12-4(b)(15). A "merchant" for purposes of 720 ILCS 5/12/4(b)(15) is defined as "an owner or operator of any retail merchantile establishment or any agent, employee, lessee, consignee, officer, director, franchisee or independent contractor of such owner or operator." 720 ILCS 5/12-4(b)(15); 720 ILCS 5/16A-2.4. Aggravated battery of a merchant is a Class 3 felony. 720 ILCS 5/12-4(e)(1).

Under §12-4(b)(20), a person commits aggravated battery if he "[k]nows the individual harmed to be a private security officer engaged in the performance of any of his or her official duties, or to prevent the private security officer from performing official duties, or in retaliation for the private security officer performing official duties." 720 ILCS 5/12-4(b)(20). A "private security officer" is "a registered employee of a private security contractor agency." 720 ILCS 12-4(b). Aggravated battery of a private security officer is a Class 2 felony. 720 ILCS 12-4(e)(2).

The plain and ordinary meaning of §12-4(b)'s subsections suggests that a defendant's conduct can fall under multiple subsections. Nothing in the language of §12-4(b) precludes the defendant from being charged with aggravated battery under either subsection where a private security guard also qualifies as a merchant. Section 12-4(b) contains no language suggesting that conduct meeting the requirements of one subsection cannot overlap with conduct that meets the requirements of another subsection. Therefore, §12-4(b)'s subsections cannot be read as exclusive and not overlapping. It is within the prosecution's discretion to select on which subsection to proceed.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Maldonado, 402 Ill.App.3d 1068, 932 N.E.2d 1038 (2d Dist. 2010)

According to the Statute on Statutes (5 ILCS 70/6), if an irreconcilable conflict exists between two Acts related to the same subject matter, the Act that was enacted last controls.

At issue are three Acts that amended the DUI statute. P.A. 94-114 made a sixth or subsequent conviction a Class X offense. P.A. 94-116, effective the same day as 94-114, made a third conviction a Class 2 offense, a fourth conviction a Class 2 offense ineligible for probation or conditional discharge, and a fifth or subsequent conviction a Class 1 offense ineligible for probation or conditional discharge. P.A. 94-963, effective six months later and containing none of the sentencing enhancements of P.A. 94-114 and P.A. 94-116, amended other subsections of the DUI statute related to uses of fines and fees.

The court agreed that P.A. 94-114 and P.A. 94-116 were irreconcilable. P.A. 94-114 made a sixth or subsequent conviction a Class X offense, while P.A. 94-116 made a fifth or subsequent conviction (which would include a sixth or subsequent conviction) a Class 1 offense.

The court rejected the argument that P.A. 94-963 controlled as the last enactment. The court reasoned that P.A. 94-114 and P.A. 94-116 affected a portion of the DUI statute separate and unrelated to the portion affected by P.A. 94-963, and therefore did not repeal those Acts. Applying the rule of lenity, however, the court held that the ambiguity created by P.A. 94-114 and P.A. 94-116 would be resolved in favor of the more lenient provision.

The court reduced defendant's conviction to a Class 1 offense and, as he had received a Class X sentence of 20 years, remanded for resentencing.

(Defendant was represented by Assistant Defender Yasemin Eken, Elgin.)

People v. McSwain, 2012 IL App (4th) 100619 (No. 4-10-0619, 1/18/12)

If a statute permits multiple convictions for simultaneous possession, the one-act, one-crime doctrine applies. When construing whether a statute permits multiple convictions, a court is required to ascertain and give effect to the intent of the legislature. the most reliable indicator of legislative intent is the plain language of the statute, which, if plain and unambiguous, must be read without exception, limitation, or other condition. Criminal statutes must be strictly construed in the defendant's favor.

The child pornography statute provides that a person commits child pornography who "with knowledge of the nature and content thereof, possesses *any* film, videotape, photograph or similar visual reproduction or depiction of any child . . . whom the person knows or reasonably should know to be under the age of 18 . . . engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection." 720 ILCS 5/11-20.1(a)(6) (emphasis added).

The term "any" in the statute could be singular or plural, as it can mean "any one of a kind," "any kind," or "any number." The term "any" thus does not adequately define the allowable unit of prosecution for a child pornography offense. The statute is therefore ambiguous and must be construed in favor of the defendant. Consequently, the simultaneous possession of multiple images cannot support multiple convictions.

While agreeing with the State that each photograph exploits the minor and adds to the market, the court held that it is for the legislature to define what it desires to make an allowable unit of prosecution. By its amendment of other statutes, the legislature has demonstrated that it knows how to authorize multiple convictions for simultaneous violations of a single statute. The legislature can amend the statute if it wants to authorize multiple convictions based on simultaneous possession of different images of child pornography.

As defendant was convicted of five counts of child pornography based on his receipt of an email that displayed five photos within the body of that email, the court vacated convictions on four of those counts.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Murphy, 2013 IL App (2d) 120068 (No. 2-12-0068, 9/27/13)

The rule of lenity provides that ambiguities in a criminal statute must be resolved in the defendant's favor. Here, the court found that the rule of lenity should not be applied so rigidly as to defeat the legislature's intent in enacting a statute. The court concluded that a rule imposing only a single conviction for the simultaneous possession of pornographic images of multiple children would defeat the legislative intent of the aggravated child pornography statute.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

People v. Olsen, 2015 IL App (2d) 140267 (No. 2-14-0267, 6/5/15)

Section 30(c) of the State Police Act provides that in-car video recording equipment shall record activities outside a patrol case when an officer (1) is conducting an enforcement stop or (2) reasonably believes a recording may assist the prosecution, enhance safety, or for any other lawful purpose. 20 ILCS 2610/30(c).

The police stopped defendant for a traffic violation and performed field sobriety tests on defendant. Although the in-car video was running, the officer, for safety reasons, conducted the sobriety tests in front of defendant's car so that none of the tests were capable of being seen on the video recording. Defendant argued that the officer's failure to record the sobriety tests amounted to "spoilation of evidence" by failing to "properly preserve evidence" as required by the statute. As a remedy, defendant requested that the court suppress all of the officer's observations during the tests.

The consequences of failing to comply with a statute's command is determined under the directory/mandatory dichotomy. Statutes are mandatory if the statute dictates a particular consequence for noncompliance. In the absence of a specific consequence, the statute is directory and no particular consequence flow from noncompliance. Statutes are also mandatory if the right the statute is designed to protect would generally be injured under a directory reading.

The Appellate Court held that the statute here was directory. It did not dictate a particular consequence for noncompliance and it did not generally injure a defendant's right to a fair trial. The purpose of recording traffic stops is to assist in the truth-seeking process by providing objective evidence of what occurred. The recordings could be useful to both the State and defendant. Since the recording could help or hinder either party, defendant's right to a fair trial would not be generally injured under a directory reading.

The trial court's order suppressing the evidence was reversed and the cause remanded for further proceedings.

(Defendant was represented by Assistant Defender Jessica Arizo, Elgin.)

People v. Patterson, 2016 IL App (1st) 101573-B (No. 1-10-1573, mod. op. 11/1/16)

Under 5 ILCS 70/4, where the legislature does not provide a specific provision concerning the retroactive or prospective application of amendatory acts, procedural amendments are to be applied retroactively while substantive amendments are applied prospectively. Where the Juvenile Court Act was amended during the respondent's appeal to increase the minimum age for mandatory transfer from 15 to 16, the legislation did not provide whether the provision was to be applied retroactively, and defendant had been 15 at the time of the offense, the court concluded that the change in age for mandatory transfer constituted a procedural change that was to be applied retroactively to cases on direct appeal.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

People v. Rigsby, 405 Ill.App.3d 916, 940 N.E.2d 113 (1st Dist. 2010)

A statute's silence on an issue creates an ambiguity in the statute that permits a court to look beyond the text of the statute to resolve the ambiguity.

Any person convicted of a felony must submit specimens of blood, saliva, or tissue to the state police for DNA analysis and pay an analysis fee of $200. 730 ILCS 5/5-4-3(a) and (j). The statute is silent on the question of whether offenders whose samples are already on file in the police database are required to submit additional samples and pay additional fees on every qualifying conviction.

The implementing regulation for §5-4-3 designating the facility or agency responsible for collecting the sample starts with the statutory presumption that the qualifying offender has not previously had a sample taken or collected ("If the qualifying offender has not previously had a sample taken . . . "). 20 Ill. Adm. Code §§1285.30(c)(1) through (c)(6). A designated facility or agency charged with the responsibility of collecting the sample would not interpret that language to require submission of multiple and duplicative DNA samples

from an offender. A one-time submission into the database is sufficient to satisfy the purpose of the statute, which is to create a database of the genetic identities of offenders. Since the analysis fee is intended to cover the costs of the DNA analysis, and only one analysis is necessary per qualifying offender, then by extension only one analysis fee is necessary.

An offender's DNA can be removed from the database if his conviction is reversed on a finding of actual innocence or he is pardoned based on a finding of actual innocence. 730 ILCS 5/5-4-3(f-1). If a DNA sample is expunged pursuant to that statute, a new sample would be required by a subsequent conviction, so there is no loophole by which an offender could wind up not having any sample on file. Fresh samples are unnecessary as DNA can remain viable for thousands of years if maintained under proper conditions.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Schneider, 403 Ill.App.3d 301, 933 N.E.2d 384 (2d Dist. 2010)

The Code of Corrections provides that the MSR term for certain offenses, including criminal sexual assault, "shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4).

The court held that this statute is ambiguous as it can be read to authorize the court to impose a determinate term anywhere between three years and life, or could be read to authorize the court to impose an indeterminate term of three years to life. Because the statute is ambiguous, the doctrine of *in pari materia* comes into play. According to this doctrine, two statutes dealing with the same subject should be considered with reference to one another to give them harmonious effect.

Applying this doctrine, the court considered other Code provisions. Other subsections of the Code provide for the imposition of a set term of MSR. The Code requires that terms are imprisonment be determinate, but contains no such requirement with respect to MSR terms. The Code gives the Department of Corrections (DOC) the authority to release a defendant from MSR when it determines that the defendant is likely to remain at liberty without committing another offense. 730 ILCS 5/3-3-8(b). It also provides for the extended supervision of sex offenders, 730 ILCS 5/3-14-2.5, and allows defendants serving extended MSR terms to request discharge from supervision. 730 ILCS 5/3-14-2.5(d). The court concluded that these provisions evidence that the legislature intended to require the court to set a minimum three-year MSR term and a maximum of life, and granted the DOC the authority to determine how long a defendant remains on MSR after three years.

The court rejected the argument that the statute delegated a judicial function to the DOC as only the court could impose a MSR term.

(Defendant was represented by Assistant Defender Patrick Carmody, Elgin.)

People v. Sedelsky, 2013 IL App (2d) 111042 (No. 2-11-1042, 9/26/13)

Statutory construction requires a court to ascertain and give effect to the intent of the legislature. The most reliable indicator of legislative intent is the language of the statute, which, if plain and unambiguous, must be read without exception, limitation, or condition. Criminal statutes must be strictly construed in defendant's favor.

The "allowable unit of prosecution" as defined by statute governs whether a particular course of conduct involves one or more distinct offenses under the statute.

Defendant was convicted and sentenced for two counts of possession of child pornography based on his possession of duplicate identical images uploaded at nearly the same time and stored in the same digital medium, but under different file names.

The child pornography statute proscribes possession of "any *** depiction by computer" of a pornographic image of a child. 720 ILCS 5/11-20.1(a)(6)."Any" is not defined by statute and can mean singular or plural. Because "any" does not indicate whether the possession of duplicate depictions by computer in the same digital medium constitute separate offenses, the statute must be construed in defendant's favor. Therefore, only one conviction of possessing child pornography can be entered for

defendant's possession of the same digital image stored in the same digital medium.

Because this holding applies only to the narrow facts presented, it does not conflict with the purpose of the child pornography statute, which is to "dry up" the pornography market. An individual possessing two duplicate digital images saved in the same medium cannot disseminate the image more widely than an individual possessing a single digital image. The images were not stored in different locations and could only be accessed through defendant's account.

(Defendant was represented by Assistant Defender Steven Wiltgen, Elgin.)

People v. Shultz, 2011 IL App (3d) 100340 (No. 3-10-0340, 10/5/11)

Disorderly conduct is defined in relevant part as conduct in which an individual knowingly "[t]ransmits or causes to be transmitted a threat of destruction of a school building or school property, or threat of violence, death, or bodily harm directed against *persons* at a school, school function, or school event, whether or not school is in session. 720 ILCS 5/26-1(a)(13).

The Statute on Statutes provides that "[i]n the construction of statutes, this Act shall be observed, unless such construction would be inconsistent with the manifest intent of the General Assembly or repugnant to the context of the statute." 5 ILCS 70/1. It also provides in relevant part that "[w]ords importing the singular number may extend and be applied to several persons or things and words importing the plural number may include the singular." 5 ILCS 70/1.03.

Applying the Statute on Statutes, the court held that the disorderly conduct statute is properly read to include both the singular and plural of the word "persons." Therefore, it reversed the circuit court's dismissal of an indictment for failure to state an offense where the indictment charged that defendant had directed threats against a single person.

Holdridge, J., dissented. Criminal or penal statutes must be strictly construed in defendant's favor. Even assuming that the Statute on Statutes applies to criminal statutes, §1.03 merely provides that words importing the plural number *may* include the singular. At most, application of the Statute on Statutes creates an ambiguity, which the rule of lenity requires be resolved in favor of the accused.

(Defendant was represented by Assistant Defender Glenn Sroka, Ottawa.)

People v. Westmoreland, 2013 IL App (2d) 120082 (No. 2-12-0082, 9/24/13)

In construing a statute, the purpose is to ascertain and give effect to the intent of the legislature. Courts should consider statutes in their entirety, bearing in mind the subjects addressed and the legislature's apparent objectives. Under the doctrine of *ejusdem generis*, when a statutory clause specifically describes several classes of persons or things and then includes "other" persons or things, the word "other" is interpreted as meaning "other such like." In addition, the last antecedent doctrine provides that relative or qualifying words or phrases in a statute modify only words or phrases which are immediately preceding, and not words or phrases that are more remote.

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Williams, 2014 IL App (3rd) 120824 (No. 3-12-0824 & 3-12-0825, 8/1/14)

The court concluded that where sentencing statutes conflict, the most recently enacted statute controls.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

People v. Wilson, 404 Ill.App.3d 244, 935 N.E.2d 587 (3d Dist. 2010)

Resisting a peace officer is punishable as a Class 4 felony if defendant's act was "the" proximate cause of an injury to the officer. 720 ILCS 5/31-1(a-7).

The resisting instructions submitted to defendant's jury required the jury to find that defendant's act was "a" proximate cause of the injury. Defendant argued that this instruction was plain error because use of the article "a" in the instruction allowed the jury to convict using a lower, more inclusive standard than

provided by statute.

The court found no error in the instruction. The court noted that 19 statutes contain the word "proximate cause," ten with the article "a" and nine with the article "the." Two statutes that contain the article "the" included the language "more than 50% of the proximate cause." If use of "the" meant there could be only a single cause of injury, the legislature's addition of the "more than 50%" language was unnecessary. The court also looked at IPI Civil Instruction 15.01, which defines "proximate cause" as "a cause which . . . produced the injury. It need not be the only cause, nor the last nor nearest cause. It is sufficient if it combines with another cause resulting in injury." The court concluded that "a" and "the" are interchangeable and "the" does not indicate that defendant's act must be the sole proximate cause.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

People v. Wilson, 2016 IL App (1st) 141500 (No. 1-14-1500, 8/19/16)

Public Act 99-69 provided that "On or after the effective date" of the Act, when a person under the age of 18 commits an offense and is sentenced as an adult the sentencing court must consider a specified list of additional mitigating factors. Defendant was found guilty of attempted first degree murder and aggravated battery with a firearm which he committed at age 17 but about three years before the effective date of P.A. 99-69. On appeal, he argued that he was entitled to remand for a new sentencing hearing because P.A. 99-69 should be applied retroactively.

The Appellate Court rejected this argument, finding that the plain language of the Act indicated that the legislature intended it to be applied only to offenses which occurred after the effective date. Unambiguous statutory language is to be applied as written, without resort to other rules of statutory construction.

(Defendant was represented by Assistant Defender Meredith Baron, Chicago.)

Village of Mundelein v. Bogachev, ___ Ill.App.3d ___, 952 N.E.2d 91 (2d Dist. 2011) (No. 2-10-0346, 5/27/11)

In construing a statute, a court seeks to effectuate the legislature's intent. The best guide to this intent is the statutory language. If the language is unambiguous, a court must apply it directly and not read in additions, exceptions or limitations that the legislature did not express.

The statutory speedy-trial provision contains two subsections. Subsection (a) applies when the defendant is in custody. Subsection (b) applies when the defendant is released on bail or recognizance. 725 ILCS 5/103-5. Subsection (a) requires that the defendant be tried within 120 days of the date that he was taken into custody (with certain exclusions), while subsection (b) and requires that he be tried within 160 days of the date that he demands trial (with the same exclusions).

Subsection (a) contains a provision, not contained in subsection (b), that "[d]elay shall be considered to be agreed to by the defendant unless he or she objects to the delay by making a written demand for trial or an oral demand for trial on the record." This provision cannot be read into subsection (b). To do so would require the court to read an addition, exception, or limitation into subsection (b) that conflicts with the legislature's unambiguous choice of words. The legislature was capable of incorporating a duty to object into subsection (b) and chose not to do so. A statute cannot be amended or modified by judicial fiat.

Because defendant was on bond, subsection (b) applied, and defendant was not required to object when the court on its own motion continued his case to a date after the statutory speedy-trial term had expired. That period of delay could not be charged to defendant based on his failure to object to the continuance.

The court affirmed the order granting defendant's motion to dismiss due to a speedy-trial violation.

(Defendant was represented by Assistant Defender Darren Miller, Elgin.)

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§48-2
Effective Date – Ex Post Facto

Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) "Legislatures may not retroactively alter the definition of crimes or increase the punishment for criminal acts." Labeling a law as "procedural" does not immunize it from scrutiny under the Ex Post Facto Clause – "[s]ubtle ex post facto violations are no more permissible than overt ones." See also, People v. Nitz, 173 Ill.2d 151, 670 N.E.2d 672 (1996) (legislature cannot effect a change in a judicial construction of a statute by a subsequent declaration of what it originally intended).

The Ex Post Facto Clause does not prohibit application of new evidentiary rules in trials for crimes committed before the changes.

Rogers v. Tennessee, 532 U.S. 451, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) The ex post facto clause, which prohibits retroactive application of legislation adversely affecting a criminal defendant, applies only to actions by the legislative branch. However, due process prohibits retroactive application of a judicial construction adversely affecting a defendant if that construction was "unexpected and indefensible by reference to the law which had been expressed prior" to defendant's acts. See also, Johnson v. Halloran, 194 Ill.2d 493, 742 N.E.2d 741 (2000) (in a concurring opinion, three justices advocated adoption of the United Supreme Court's test for determining whether a new or amended statute will be applied to a case that is pending on appeal).

Carmell v. Texas, 529 U.S. 513, 120 S.CT. 1620, 146 L.Ed.2d 577 (2000) The ex post facto clause applies to four categories of statutes:

1. Laws which criminalize an act that was innocent when performed.
2. Laws which increase the seriousness of a crime after it is committed.
3. Laws which increase the punishment for an offense after it is committed.
4. Laws which, "in order to convict the offender," alter the rules of evidence and require "less, or different, testimony, than the law required when the offense was committed.

Defendant was convicted of 15 sexual offenses against his daughter, and challenged four of the convictions. At the time of the offenses, Texas law provided that a conviction for sexual assault could be based on the testimony of a victim over the age of 14 only if there was corroborating evidence or the victim informed another person of the offense within six months. At trial, the court applied an amended statute which permitted a conviction on uncorroborated testimony if the victim was under 18.

Because the amendment permitted a conviction on less evidence than had been required at the time of the offense, the ex post facto clause was violated.

Stogner v. California, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003) The ex post facto clause applies to laws which: (a) criminalize an act that was innocent when performed; (b) increase the seriousness of a crime after it is committed; (c) increase the punishment for an offense after it is committed; or (d) in order to convict the offender alter the rules of evidence to permit "less, or different, testimony, than the law required" when the offense was committed.

The ex post facto clause was violated by a California law extending the statute of limitations for offenses on which the original statute of limitations had expired before the legislature acted. The legislation deprived defendant of fair warning to preserve exculpatory evidence. However, extension of an unexpired statute of limitations has been held not to create an ex post facto violation.

Kansas v. Hendricks, 521 U.S. 346, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997) Where a commitment procedure for sexually violent predators was civil rather than criminal, the ex post facto clause did not apply.

Garner v. Jones, 529 U.S. 244, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000) Under California DOC v. Morales, 514 U.S. 499 (1995), whether retroactive application of changes in parole procedures violates the ex post facto clause depends on whether the changes create "a sufficient risk of increasing the measure of punishment attached to the covered crimes." In Morales, a California statute increasing the frequency of reconsideration for parole from once a year to up to three years did not create a significant risk that punishment would be increased for previously committed crimes, particularly since the statute provided for more frequent reconsideration where circumstances change.

Here, the ex post facto clause was not violated by retroactive application of amendments increasing the time period between reconsideration of parole from three to eight years for Georgia prisoners serving life sentences. Because the parole board had discretion to set more frequent reconsideration and board policy permitted expedited reviews upon a change of circumstances, there was not "a sufficient risk of increasing the measure of punishment attached to the covered crimes."

Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) Retroactive revocation of early release credits violated the ex post facto clause.

To establish an ex post facto violation, defendant must show that the law in question was applied to events which occurred before its enactment and disadvantaged him "by altering the definition of criminal conduct or increasing the punishment for the crime." The statute in question was clearly applied to events that occurred before its enactment, since it was used to invalidate previously-issued early release credits. In addition, revocation of the early release credits "unquestionably disadvantaged the petitioner because it resulted in his rearrest and prolonged his imprisonment."

The subjective motivation of the legislature in enacting particular laws is irrelevant to whether an ex post facto violation exists; the sole question is whether a retroactive law has the effect of increasing defendant's punishment.

Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) State statute enacted after the date of defendant's offense, which allowed him to earn less good time credit on his prison sentence than he would earn under the statute in effect on the date of his crime, constituted an ex post facto law.

People v. Shumpert, 126 Ill.2d 344, 533 N.E.2d 1106 (1989) A bill that does not contain an express effective date becomes effective according to the following principles:

1. A bill "passed" by the legislature before July 1 becomes effective on the following January 1 or upon its becoming law, whichever is later.
2. A bill "passed" by the legislature after June 30 becomes effective on July 1 of the next year.
3. A bill is "passed" at the time of the final legislative action prior to its presentation to the Governor.
4. If the Governor exercises an amendatory veto, the bill is "passed" when the legislature votes to accept the Governor's recommendations.

Upon a vote of three-fifths of the members of each house, a bill may provide for an earlier effective date (see People ex rel. Klinger v. Howlett, 50 Ill.2d 242, 278 N.E.2d 84 (1972)). However, an effective date provision "must be expressly and clearly made . . . in straightforward and unambiguous language."

Springfield v. Allphin, 74 Ill.2d 117, 384 N.E.2d 310 (1978) When a bill is passed by the legislature before July 1 and is amendatorily vetoed by the Governor, but the veto is overridden by the legislature, the bill was "passed" prior to July 1.

People v. Atkins, 217 Ill.2d 66, 838 N.E.2d 943 (2005) Whether a statutory amendment may be applied retroactively generally depends on whether the legislature specifically indicated an intention for retroactive application. If no such intention is stated in the legislation, 5 ILCS 70/4 provides that procedural changes

may be applied retroactively. Substantive changes must be applied prospectively only.

People v. Brown, 225 Ill.2d 188, 866 N.E.2d 1163 (2007) In determining whether a statute can apply retroactively, the threshold inquiry is whether the legislature expressly provided for retroactive or prospective application. If so, that intention is given effect, absent some constitutional prohibition.

Where a statute was enacted in June 1998 with delayed effective dates of January 1, 1999 and January 1, 2000, "it is clear that the law was intended to have only prospective application." Only statutes with an immediate effective date are intended to apply retroactively.

Fletcher v. Williams, 179 Ill.2d 225, 688 N.E.2d 635 (1997) Plaintiffs, inmates of the Department of Corrections, were convicted when statute required annual parole hearings. The statute was subsequently amended to allow the Prisoner Review Board to schedule future parole hearings at intervals up to three years if it found "that it is not reasonable to expect that parole would be granted" at an earlier hearing. Plaintiffs brought a declaratory action seeking a ruling that the ex post facto clause would be violated if the amended statute was applied to persons who had been convicted before its effective date.

A criminal law is ex post facto only where it "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." In California Department of Corrections v. Morales, 514 U.S. 499 (1995), which involved a statutory modification similar to that in this case, the U.S. Supreme Court held that an ex post facto violation existed only if the amendment produced "a sufficient risk of increasing the measure of punishment attached to the covered crimes." The Morales court concluded that in view of several provisions authorizing California parole authorities to tailor the frequency of parole hearings to the circumstances, there was only a "speculative and attenuated possibility" that punishment would be increased. Thus, no ex post facto violation occurred. In light of Morales, the nearly identical amendment here did not create an ex post facto violation.

People v. Jones, 219 Ill.2d 1, 845 N.E.2d 598 (2006) At the time of trial, 725 ILCS 5/1-6 required that the State prove venue beyond a reasonable doubt. Although §1-6 was subsequently amended to remove the venue requirement, the amendment made a substantive change in the law and therefore could not be applied retroactively.

People v. Digirolamo, 179 Ill.2d 24, 688 N.E.2d 116 (1997) An amendment to 720 ILCS 5/1-6(a) - to eliminate the requirement that the State prove venue - could not be applied to offenses that occurred prior to its effective date (August 11, 1995). The amendment was substantive, rather than procedural, because it purported to modify long-standing Illinois Supreme Court caselaw that venue is an element of the offense and must be proven by the State beyond a reasonable doubt. Because substantive amendments are generally not applied retroactively, the amendment did not relieve the State of its burden to prove venue in this case.

Barger v. Peters, 163 Ill.2d 357, 645 N.E.2d 175 (1994) Effective August 11, 1993, the legislature amended the Unified Code of Corrections to prohibit persons convicted of certain crimes form receiving additional good time credit for participation in prison educational programs. The amendments violated the prohibition against ex post facto laws and could not be applied to persons convicted before the effective date.

The ex post facto clause of the Illinois Constitution was intended to carry the same meaning as Article I, §9 of the Federal Constitution. The ex post facto clause of the Federal Constitution prohibits statutory modifications that inflict "greater punishment" on a defendant than was authorized at the time the crime was committed. For ex post facto purposes, the term "punishment" includes not only the sentence authorized for a particular crime, but also "the actual time that [a defendant] spends in prison." Statutory changes that prevent convicted persons from reducing their prison time to the extent authorized at the time of their convictions increase their "punishment," and therefore violate the prohibition against ex post facto

laws.

People v. Dunigan, 165 Ill.2d 235, 650 N.E.2d 1026 (1995) The Habitual Criminal Act, which mandates a natural life sentence upon a third conviction for specified offenses, does not impose punishment for the two prior convictions used to establish eligibility. Instead, the Act merely uses defendant's propensity to commit violent crimes to provide enhanced punishment for the third offense. Because the Act punishes defendant solely for the third offense, no ex post facto question arises.

People v. Anderson, 53 Ill.2d 437, 292 N.E.2d 364 (1973) An amendment to the speedy trial statute, effective after the date of the alleged offense, could be properly applied to defendant. The amendment did not constitute an ex post facto law; it did not alter an "accrued right," make criminal an act that was innocent when done, increase the punishment after the act, alter legal rules of evidence in order to convict defendant, or deprive defendant of any substantive right or defense available at the time of the offense. See also, People v. Dorff, 77 Ill.App.3d 882, 396 N.E.2d 827 (3d Dist. 1979).

People v. Ruiz, 107 Ill.2d 19, 479 N.E.2d 922 (1985) When a statutory amendment relates to procedural matters it is applicable to proceedings held on or after its effective date. In this case, the amendment to the Post-Conviction Hearing Act which required that a petition be assigned to a judge not involved in the original proceeding was applicable to proceedings on or after its effective date.

People v. J.S., 103 Ill.2d 395, 469 N.E.2d 1090 (1984) Whether a statute should be given prospective or retroactive application, is determined by looking to the intent of the legislature. Generally, a statute will be given prospective application unless there is a clear expression of legislative intent that it is to be retroactively applied.

PA 83-1067, which reclassified certain sex offenses did not apply to a person who committed an offense prior to the Act's effective date — July 1, 1984. The legislature in the Act itself provided that it apply only to "persons who commit [the offenses in the Act] on or after the effective date."

People v. Kellick, 102 Ill.2d 162, 464 N.E.2d 1037 (1984) Defendant was convicted of the murder of a 15-year old boy on July 16, 1982. He was found eligible for the death penalty under Ch. 38, ¶9-1(b)(7) (victim under 16 years of age).

Section 9-1(b)(7) became law on October 29, 1981 and was effective July 1, 1982. However, another version of ¶9-1(b)(7) was passed on June 24, 1982 and was signed into law on December 15, 1982. This version permitted death eligibility where the victim was under 12 years of age.

The Supreme Court reviewed the legislative history of both versions of ¶9-1(b)(7), and determined that the latter version was to operate retrospectively to July 1, 1982. Thus, defendant was not eligible for the death penalty.

People v. Hollins, 51 Ill.2d 68, 280 N.E.2d 710 (1972) A change in the method of sentencing does not violate the prohibition against ex post facto laws. However, a defendant is entitled to be sentenced under either the law in effect when the offense was committed or that in effect at the time of sentencing.

The failure to admonish defendant of his right to elect is a denial of due process. See also, **People v. James**, 46 Ill.2d 71, 263 N.E.2d 5 (1970).

People v. Gonzales, 56 Ill.2d 453, 308 N.E.2d 587 (1974) The trial judge's failure to admonish defendant concerning his right to be sentenced under the statute in effect at the time of the offense did not, under the circumstances of this case, constitute a denial of due process or equal protection. It is merely speculation that defendant would have benefitted under the prior law, and his delay of eight years in filing a post-conviction petition prejudiced the possibility of a trial.

People v. Jackson, 99 Ill.2d 476, 459 N.E.2d 1362 (1984) Defendant was convicted of theft for taking property valued at $251. At the time of the crime, theft of property valued over $150 was a felony. At the time of defendant's trial, theft of property valued over $300 was a felony, and theft of property valued less than $300 was a misdemeanor.

Defendant was entitled to be sentenced for a misdemeanor under the law in effect at the time of trial. When an amendment to a statute applies only to sentencing and not to substantive elements of the offense, defendant is entitled to application of an amended statute that is in effect at the time of sentencing, even where the offense occurred before the effective date of the amendment.

People v. Cross, 77 Ill.2d 396, 396 N.E.2d 12 (1979) Where a sentence of periodic imprisonment was available at the time of the crime but not at the time of sentencing, defendant was entitled to be sentenced under the statute in effect at the time of the crime.

Johnson v. People, 173 Ill.131, 50 N.E. 321 (1898) Where the law at the time of the crime required the jury to impose the sentence, defendant was entitled to sentencing by the jury though the statute had been amended before his trial to require sentencing by the judge.

Roth v. Yackley, 77 Ill.2d 423, 396 N.E.2d 520 (1979) Where the legislature amends a statute that has been construed by the Court, that amendment may only be applied prospectively from its effective date. An attempt to apply such an amendment retroactively, to annul or overrule the Court's decision, would violate the separation of powers doctrine.

People v. Coleman, 111 Ill.2d 87, 488 N.E.2d 1009 (1986) Defendant pleaded guilty to DUI and requested supervision. Three years earlier defendant had pleaded guilty to DUI and received supervision. Statute prohibiting supervision to a defendant charged with DUI if he has received supervision for the same offense within the previous five years became effective after defendant's first offense but before his second offense. Statute was not ex post facto; it did not increase the penalty imposed for an offense that occurred before its effective date, but merely created an enhanced penalty for offenses occurring after its effective date. Defendant had adequate notice at the time of his second offense that being convicted of DUI within five years of his prior supervision would subject him to a heightened sanction.

People v. Bates, 124 Ill.2d 81, 529 N.E.2d 227 (1988) Amendment to the Post-Conviction Hearing Act which shortened the time period for filing a petition is to be applied retroactively.

People v. Granados, 172 Ill.2d 358, 666 N.E.2d 1191 (1996) Though the *ex post facto* clause applies to judicial interpretations of statutory law, the prohibition against *ex post facto* laws applies only where a criminal statute is "enlarged" by subsequent decisions. Here, the case in question did not "enlarge" the statutory meaning; it merely interpreted the plain meaning of unambiguous statutory language, and reached a result different than that previously reached by the Appellate Court.

Furthermore, the *ex post facto* prohibition applies only where a change in the law is "unforeseeable." Since defendant's acts were covered by the plain statutory language, the case in question was not "unforeseeable" despite the existence of conflicting appellate precedent.

People v. Ramsey, 192 Ill.2d 154, 735 N.E.2d 533 (2000) Application of statutory amendments to the insanity defense which passed after defendant's criminal acts would violate the ex post facto clause by depriving defendant of an affirmative defense and increasing his burden of proof.

People v. Harvey, 196 Ill.2d 444, 753 N.E.2d 293 (2001) The ex post facto clause was not violated by imposition of an extended term based upon a 1974 conviction for attempt murder, which was a Class 1 felony at the time of that conviction but which had been subsequently reclassified as a Class X felony that was

subject to extended term sentencing. Defendant's ex post facto argument was flawed because it failed to recognize that: (1) the extended term was for defendant's subsequent conviction for armed robbery rather than an additional punishment for the prior attempt murder, and (2) attempt murder and armed robbery maintained the same relative severity before and after the reclassification.

People v. Malchow, 193 Ill.2d 413, 739 N.E.2d 433 (2000) The Sex Offender Registration Act and the Sex Offender and Child Murderer Community Notification Law do not violate: (1) the ex post facto clause; (2) the Eighth Amendment prohibition of cruel, unusual and disproportionate punishment; (3) the Illinois constitutional requirement of proportionate sentencing; (4) the right to privacy under the United States and Illinois Constitutions; (5) double jeopardy; (6) due process; or (7) equal protection.

People v. Cornelius, 213 Ill.2d 178, 821 N.E.2d 288 (2004) The holding of Malchow was not changed by the subsequent amendment of the Acts to require the Illinois State Police to maintain a web site with information about photographs of sex offenders. The Internet provision does not violate defendant's right to privacy under the Illinois Constitution, because a person who has been declared a sex offender has no privacy interest in the records concerning his status. Sex offender registration information is a matter of public record, and the Internet provision merely affords citizens an additional means of gaining access to such information.

People v. Glisson, 202 Ill.2d 499, 782 N.E.2d 251 (2002) Although defendant's conviction was on appeal when the General Assembly repealed the statute which criminalized her conduct, and the legislation did not include a clause providing that convictions obtained while the prohibition was in effect were to be continued, defendant was not entitled to have her conviction overturned. The general savings clause (5 ILCS 70/4) provides that only procedural amendments may be applied retroactively. Because a statute repealing a crime is substantive rather than procedural, the repeal could not be applied to previous conduct.

People v. Johnson, 133 Ill.App.2d 818, 263 N.E.2d 901 (4th Dist. 1970) Statutory amendment that increases punishment after the offense is ex post facto.

People v. Bedford, 53 Ill.App.3d 1005, 369 N.E.2d 84 (1st Dist. 1977) Defendant has the right to elect to be sentenced under the statute in effect at the time of the offense or that in effect at the time of sentencing, whichever he considers more desirable.

People v. McClain, 343 Ill.App.3d 1122, 799 N.E.2d 322 (1st Dist. 2003) Generally, a statutory amendment will be applied prospectively only. The presumption of non-retroactive application can be rebutted by express statutory language or by implication. Furthermore, an amendment which affects only procedural rights, and which was intended to apply retroactively, can be applied to pending cases.

The "Apprendi-fix" statute (P.A. 91-953) could be applied to offenses which occurred before the statute's effective date.

People v. O'Quinn, 339 Ill.App.3d 347, 791 N.E.2d 1066 (5th Dist. 2003) Use of a special interrogatory concerning an extended term eligibility factor did not violate the ex post facto clause.

In re J.R., 302 Ill.App.3d 87, 704 N.E.2d 809 (1st Dist. 1998) Under the ex post facto clauses of the Illinois and U.S. constitutions, a criminal statute is ex post facto if it: (1) applies to events that occurred before its enactment, and (2) falls into one of the traditional categories of prohibited criminal laws, which include: (a) punishing as a crime an act that was not a crime when it was performed, (b) imposing "more burdensome" punishment for a crime after its commission, or (c) depriving a criminal defendant of a defense that was available when the crime was committed. The ex post facto clause applies to both juvenile and adult

proceedings.

Application of a statute authorizing transfer of DCFS wards to DOC was not ex post facto though it was passed after the minors' offenses. The length of respondents' sentences was not extended, and their opportunities for early release were not restricted. The amendment merely altered the location of their confinement.

Under current law, "the focus of the ex post facto inquiry is not on whether a legislative change produces some ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable."

People v. Vaughn, 49 Ill.App.3d 37, 363 N.E.2d 879 (5th Dist. 1977) At the time defendant committed a felony, the statute required that prosecution for felonies be commenced by indictment. Shortly thereafter, an amendment became effective which allowed prosecution for felonies by either indictment or information. Because the statutory change was only procedural, defendant could be charged by information.

People v. Criss, 307 Ill.App.3d 888, 719 N.E.2d 776 (1st Dist. 1999) The trial judge erred by refusing to instruct the jury on the entrapment defense as it existed at the time of the offense. Under the ex post facto clauses of the Illinois and United States constitutions, a criminal law is invalid if it is retrospective (i.e., applies to events that occurred before it was enacted) and falls into one of the traditional categories of prohibited criminal laws (i.e., statutes which punish as a crime an act that was innocent when committed, make the punishment for a crime more burdensome after its commission, or deprive an accused of a defense which was available when the act was committed). The purposes of the ex post facto clause are to insure that legislative enactments give fair warning of their effect and to permit individuals to rely on statutes until they are explicitly changed.

At the time of the offense, to rebut an entrapment defense the State was required to show that defendant was predisposed to commit the offense and originated the "criminal purpose" of the offense. After the offense, the entrapment statute was amended so the State was no longer required to prove that defendant originated the criminal purpose.

The amendment "dramatically altered" the State's burden of proof in rebutting evidence of entrapment, and therefore constituted a material change in the law. Because the amendment removed a defense that was available at the time of the conduct in question, defendant was entitled to have the jury instructed on the law as it was at the time of the offense.

People v. Hickman, 143 Ill.App.3d 195, 492 N.E.2d 1041 (5th Dist. 1986) Amendment to statute which placed the burden on defendant to prove insanity applies only to offenses committed on or after the effective date (January 1, 1984).

People v. Dalby, 115 Ill.App.3d 35, 450 N.E.2d 31 (3d Dist. 1983) A defendant who is tried after the effective date of the guilty but mentally ill statute may be properly convicted thereunder, though the offense was committed before the effective date.

People v. Dorff, 77 Ill.App.3d 882, 396 N.E.2d 827 (3d Dist. 1979) The "rape shield" statute, which became effective after the date of the offense but before defendant's trial, was applicable at that trial. See also, **People v. Morton**, 188 Ill.App.3d 95, 543 N.E.2d 1366 (4th Dist. 1989) (Amendment to Section 115-10, the hearsay exception regarding complaints by child sex offense victims, applies to trials held on or after its effective date).

People v. Primmer, 111 Ill.App.3d 1046, 444 N.E.2d 829 (4th Dist. 1983) Defendant was properly convicted of armed violence based upon the underlying felony of criminal damage to property (over $150 but less than $300). After the offense but before defendant's trial, an amendment to the criminal damage

statute became effective which made criminal damage of less than $300 a misdemeanor.

People v. DeStefano, 64 Ill.App.3d 389, 212 N.E.2d 357 (1st Dist. 1965) Defendant was properly convicted of illegal voting though the illegal voting statute had been repealed before his trial, but after the date of the offense.

People v. Fisher, 135 Ill.App.3d 502, 481 N.E.2d 1233 (3d Dist. 1985) Defendant was properly convicted of indecent liberties, a Class 1 felony. After the date of the offense, the indecent liberties statute was repealed and replaced by the Class 2 felony of criminal sexual abuse. The latter statute specifically applies only to acts committed after its effective date.

People v. Leroy, 357 Ill.App.3d 530, 828 N.E.2d 769 (5th Dist. 2005) 720 ILCS 5/11-9.4(b-5), which prohibits persons convicted of sex offenses against children from knowingly residing within 500 feet of a playground or facility providing programs or services exclusively directed towards persons under 18 years of age, but which excepts offenders who owned the property in question before the effective date of the statute, does not violate the ex post facto clause.

People v. Starnes, 273 Ill.App.3d 911, 653 N.E.2d 4 (1st Dist. 1995) The ex post facto clause applies only to criminal conduct; because the Child Sex Offender Registration Act does not involve punishment (see People v. Adams, 144 Ill.2d 381, 581 N.E.2d 637 (1991)), the ex post facto clause is inapplicable to amendments to the Act that took effect while defendant's criminal case was pending and which increased the registration requirements.

People v. Woodard, 367 Ill.App.3d 304, 854 N.E.2d 674 (1st Dist. 2006) P.A. 94-945, which effective June 27, 2006 amended the definition of "sex offender" to provide that persons convicted of first degree murder of a person under the age of 18 were not subject to sex offender registration requirements unless the offense was sexually motivated, does not apply retroactively. The legislature did not indicate an intent for retroactive application.

People v. Cortez, 286 Ill.App.3d 478, 676 N.E.2d 195 (1st Dist. 1996) Application of the 1993 version of the stalking statute to defendant's conduct did not violate the ex post facto clause, despite the fact that the conduct occurred before the effective date of the statute. The ex post facto clause is violated only where: (1) the State charges defendant under a statute for conduct which occurred prior to the statute's enactment, and (2) the statute's application further disadvantages defendant. Defendant is "further disadvantaged" where a statute punishes him for conduct that was previously lawful, increases the penalty for particular crime, or removes a defense that was available when the act occurred.

Defendant's conduct was unlawful under both versions of the stalking statute, and defendant did not claim that application of the amended act deprived him of a defense or subjected him to an increased penalty.

People v. Toia, 333 Ill.App.3d 523, 776 N.E.2d 599 (1st Dist. 2002) Public Act 89-637 (eff. January 1, 1997), which specifically excludes DUI arrests from records which are subject to expungement where supervision is ordered, did not violate the *ex post facto* clauses of the Illinois or Federal Constitutions although it was enacted during the five-year waiting period after which, under the prior law, defendant could have moved for expungement.

The mere fact that an enactment works to a defendant's disadvantage does not necessarily implicate the *ex post facto* clauses; the focus of the inquiry is not whether the change produces some "ambiguous sort of 'disadvantage,' . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." In determining whether an act constitutes "punishment," the court must consider the legislature's intent and also whether the law has a punitive effect despite the

legislature's intent. The party challenging a statute has the burden to demonstrate clearly that the effect of the law is so punitive as to negate the legislature's intent.

The legislature had two purposes in enacting P.A. 89-637: (1) to promote public safety, and (2) to deter future DUI violations. Because both purposes are non-punitive, the *ex post facto* clause applies only if the effect of the change was punitive despite the legislature's intent. P.A. 89-637's effect was not so punitive as to defeat the legislature's intent - the expungement provision places no permanent disability or restraint on DUI offenders, but merely removes the ability to have records expunged. The inability to expunge arrest records bears little resemblance to traditional notions of punishment such as imprisonment and fines, and affects only a collateral consequence of an arrest. Denying DUI offenders an opportunity to expunge arrest records is not excessive in relation to the goal of promoting public safety.

People v. Boatman, 386 Ill.App.3d 469, 898 N.E.2d 277 (4th Dist. 2008) Public Act 95-688 (eff. October 23, 2007) amended 725 ILCS 5/116-3(a) to provide that a defendant is eligible for post-conviction DNA testing where such testing was not performed at trial or additional testing methods have become available since defendant's trial. Because the hearing on defendant's motion occurred after October 23, 2007, the trial court should have applied the amended version of §116-3(a) although defendant's conviction occurred before the amendment's effective date.

Peugh v. U.S., U.S. , S.Ct. , L.Ed.2d (2013) (No. 12-62, 6/10/13)

1. The *ex post facto* clause prohibits the passage of laws which increase the severity of an offense or inflict greater punishment than was authorized when the crime was committed. The *ex post facto* clause applies to laws which criminalize conduct that was innocent when committed, make a crime more serious than it was when committed, inflict greater punishment than attached to the crime when it was committed, or reduce the burden of evidence required to convict below what was required at the time of the offense.

A law may violate the *ex post facto* clause even where it does not affect the maximum sentence for which the defendant is eligible, and even where the sentencing authority retains some sentencing discretion. An *ex post facto* violation is not created by mere speculation or conjecture that a change in the law will retrospectively increase the punishment for the crime. Instead, the touchstone of an *ex post facto* inquiry is whether a given change in the law presents a sufficient risk of increasing the measure of punishment attached to the covered crimes.

The court concluded that the *ex post facto* clause was violated where the trial court applied federal sentencing guidelines which were adopted after the crime was committed.

2. Although federal sentencing guidelines are advisory only, they represent the starting point of an appropriate sentence. The district court must then consider the arguments of the parties and specified statutory factors to determine the appropriate sentence. The trial court may not presume that the guideline range is reasonable, and must explain the basis for its sentence on the record.

Error occurs where the trial court fails to calculate the guideline range correctly or treats the guidelines as mandatory. A reviewing court may, but need not, presume that a sentence that is within the guidelines is reasonable.

The court concluded that application of the amended guidelines presented a substantial risk that the punishment for the crime would be increased. First, the new guidelines resulted in a sentencing range that was more than double that which would have been suggested by the guidelines in effect at the time of the offense. Second, because the trial court is required to use the guidelines as a starting point in its analysis, the guidelines provide the framework for sentencing even if the trial court ultimately decides to give a sentence outside the guidelines. The court concluded that the guidelines impose a series of requirements that limit the exercise of discretion by sentencing courts and in general "steer" courts to impose sentences that are within

the guidelines. Thus, using guidelines which increase the suggested sentence poses a substantial risk that a higher sentence will be imposed.

The court rejected the prosecution's argument that because the guidelines are not mandatory, they do not constitute a "law" for purposes of the *ex post facto* clause. The court noted that a change in the applicable law need not be binding on the sentencing authority in order for an *ex post facto* violation to occur. Furthermore, because district courts must begin their sentencing analysis with the guidelines and reviewing courts may regard a sentence within the guidelines as reasonable, the guidelines "anchor both the district court's discretion and the appellate review process."

Because there was a substantial risk of greater punishment where application of the new guidelines increased the suggested sentence for bank fraud from 30 to 37 months to 70 to 87 months, the *ex post facto* clause was violated. The court reversed the sentence and remanded the cause for resentencing.

People v. Amigon, 239 Ill.2d 71, 940 N.E.2d 63 (2010)

In 2003 the legislature enacted a statute providing that any statement made by the accused during custodial interrogation shall be presumed inadmissible unless electronically recorded. 725 ILCS 5/103-2.1. The legislature expressly delayed the effective date of the statute until 2005. The legislative decision to delay implementation of the statute established that it intended that the recording requirement not be applied retroactively to exclude custodial statements made years before the statute's enactment date.

People v. Ziobro, 242 Ill.2d 34, 949 N.E.2d 631 (2011)

Public Act 96-694, effective 1/1/10 (adding 625 ILCS 5/16-106.3), prohibits the dismissal of DUI charges due to a violation of Supreme Court Rules 504 and 505, which set time limitations on first court appearances in traffic cases. Section 4 of the Statute on Statutes (5 ILCS 70/4) governs where a statute is otherwise silent as to its retroactive effect. Section 4 prohibits retroactive application of substantive provisions and provides that procedural law changes apply to ongoing proceedings. This new provision barring dismissal as a remedy is procedural as it does not affect a vested right. Therefore, courts are bound by the new law on cases remanded to the circuit court by a reviewing court.

Walker v. Hill, 241 Ill.2d 479, 948 N.E.2d 601 (2011)

1. The *ex post facto* clauses of the United States and Illinois constitutions prohibit the enactment of laws which retroactively alter the definition of a crime or increase the punishment for a criminal act. *Ex post facto* principles were not violated where the Prisoner Review Board changed its interpretation of 730 ILCS 5/3-3-5(c)(2), which requires that parole be denied if the defendant's release would deprecate the seriousness of the offense, between the time defendant was sentenced and his parole hearing.

By definition, a discretionary parole system is subject to modification based on experience and new insights. Furthermore, this issue does not involve the retroactive application of a change in a rule or a statute, but a change in the way the Prisoner Review Board exercises its discretion through an existing rule. The Board does not violate the *ex post facto* clauses of either the State or federal constitutions because it modifies the manner in which it exercises its discretion.

2. Similarly, the *ex post facto* clauses were not violated by an amendment to a statute governing the frequency of parole hearings. Under U.S. Supreme Court and Illinois precedent, a decrease in the frequency of parole hearings is *ex post facto* only if there is a sufficient risk that the defendant's punishment for the crimes will be increased. An amendment which creates only a speculative possibility that punishment will be increased is not *ex post facto*.

Here, the amendment to 730 ILCS 5/3-3-5(f), which governs the frequency of parole hearings, did not create a substantial risk that punishment will be increased. When defendant was convicted, §3-3-5(f) provided for a parole hearing every 12 months. In 1996, the statute was amended to allow the Prisoner Review Board to extend the time between hearings up to three years if it is not reasonable to expect that parole will be granted in that period. Because extended periods between parole hearings are permitted only when there is no reasonable likelihood that parole will be granted, the Prisoner Review Board has authority

to tailor the frequency of parole hearings to the particular circumstances, and an inmate may seek a parole hearing at any time based upon new facts or extraordinary circumstances, there is no reasonable likelihood that the amendment will result in increased punishment. Thus, no *ex post facto* violation occurred.

The dismissal of defendant's complaint seeking declaratory and *mandamus* relief was affirmed.

People v. Adams, 404 Ill.App.3d 405, 935 N.E.2d 693 (1st Dist. 2010)

1. A statute comports with substantive due process where it bears a reasonable relationship to a public interest to be served and the means adopted are a reasonable method of accomplishing the desired objective.

The purpose of the armed habitual criminal statute, 720 ILCS 5/24-1.7, is to criminalize recidivist offenders who subsequently receive, possess, sell or transfer firearms and whose prior offenses are of a particular class or nature.

The court concluded that the purpose of the statute to deter and punish such offenders is effectively and reasonably achieved by the statute. The statute does not merely criminalize an offender's character or propensity to commit crimes. The statute requires proof of present conduct before the offender's prior offenses become relevant.

2. The *ex post facto* clause prohibits statutes that increase the punishment for an offense after it is committed. The armed habitual criminal statute does not violate the *ex post facto* prohibition because it punishes the defendant for new and separate crimes committed after the statute was enacted. The prior offenses are merely elements of the offense.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

People v. Aguilar, 408 Ill.App.3d 136, 944 N.E.2d 816 (1st Dist. 2011)

1. Under Illinois law, courts give effect to a clear expression of legislative intent concerning whether a statute is to be applied retroactively. Where there is no clear expression of legislative intent, procedural amendments are generally applied retroactively, while substantive amendments are applied prospectively.

Amendments to the definition of the offense of aggravated unlawful use of a weapon were not intended to apply retroactively to conduct which occurred before the effective date. Because the public act (P.A. 96-742) stated that it would be effective upon becoming a law, the court concluded that it contained an unambiguous statement of legislative intent that the new provisions were to be applied prospectively.

The court acknowledged that where the legislature amends a statute shortly after a controversy concerning the meaning of the statute, it is presumed that the amendment was intended as a legislative interpretation of the original legislation. However, a subsequent amendment does not replace the plain language of the statute as the best evidence of the legislature's original intent. In addition, the amendment here went further than would have been necessary to correct any possible belief by the legislature that the courts had misinterpreted legislative intent.

2. Generally, constitutional challenges are addressed under the "rational basis" or "strict scrutiny" tests. In **Heller**, the court concluded that the "rational basis" test does not afford a sufficient level of judicial scrutiny where the statute in question regulates a specific, enumerated constitutional right, such as the right to bear arms.

The Appellate Court also found that the "strict scrutiny" standard does not provide an appropriate level of review for Second Amendment issues. The "strict scrutiny" standard examines a statute to determine whether it is narrowly tailored to achieve a compelling governmental interest, and is most commonly used for race-based legislation or classifications or where a statute interferes with a fundamental constitutional right such as freedom of speech.

Noting that the U.S. Supreme Court has not specified a standard of review for Second Amendment issues, the court endorsed the "intermediate scrutiny" standard of review adopted by some jurisdictions when reviewing statutes which impose "less than severe" restrictions on the possession of firearms. Under the "intermediate scrutiny" standard, the court examines whether the law in question serves a significant,

substantial, or important governmental interest and if so, whether the "fit" between the regulation and the asserted interest is reasonable.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Bethel, 2012 IL App (5th) 100330 (No. 5-10-0330, 8/31/12)

1. To determine whether a statutory amendment is retroactive, a court initially determines whether the legislature has expressly stated the temporal reach of amendment. If the legislature has done so, the expression of the legislature must be given effect absent a constitutional prohibition.

If the legislature has not clearly stated the temporal reach of the amendment, a court must next determine whether applying the amendment would have a retroactive impact. To make this determination, a court considers whether the retroactive application of the amendment impairs rights a party possessed while acting, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed.

The Statute on Statutes provides a clear legislative directive as to the temporal reach of an amendment where none is expressly stated. Statutory amendments that are procedural may be applied retroactively, while amendments that are substantive may not. 5 ILCS 70/4. If retroactive application has inequitable consequences, the court will presume that the statute does not govern the case.

2. The Sexually Violent Persons Commitment Act contains an amendment that tolls the running of an MSR term upon the filing of a sexually violent persons petition until the petition is dismissed, or a finding is made that the inmate is not a sexually violent person, or the inmate is discharged by the court as no longer sexually violent. 725 ILCS 207/15(e). This amendment was adopted after defendant pleaded guilty, but before he was due to be released on MSR.

The amendment does not expressly state that it applies retroactively, and there is no legislative directive as to the temporal reach of the amendment. The purpose of the amendment is to suspend the running of the MSR term to ensure that the inmate will be subject to intensive supervision upon release. There is nothing in the statute excusing an inmate from complying with the terms and conditions of MSR while the running of the MSR term is tolled. Application of the tolling provision has a definite, immediate, and substantive effect on the length of an inmate's MSR term, and is therefore substantive.

Because the tolling provision is substantive, the Appellate Court presumed that it would not apply retroactively to defendant who was admonished when he pleaded guilty that he would be subject to a three-year MSR term upon completion of his sentence. Assuming for the sake of argument that the tolling provision does apply to defendant, the Appellate Court presumed that the legislature did not intend for defendant to be bound by the terms and conditions of MSR and subject to revocation of MSR during the period of his commitment as a sexually violent person.

Because defendant's post-conviction claim that his guilty pleas were not knowing and voluntary and that he was subject to *ex post facto* punishment was dependent on the retroactivity of the tolling provision, the Appellate Court affirmed the dismissal of defendant's post-conviction petition as frivolous.

(Defendant was represented by Assistant Defender Robert Burke, Mt. Vernon.)

People v. Dalton, 406 Ill.App.3d 158, 941 N.E.2d 428 (2d Dist. 2010)

Both the Federal and State Constitutions prohibit *ex post facto* laws that disadvantage a defendant by either criminalizing an act that was innocent when done, increase the punishment for a previously-committed offense, or alter the rules of evidence by making a conviction easier to obtain. The prohibition of *ex post facto* laws applies only to punitive laws. It does not apply to fees that are compensatory rather than punitive.

The central characteristic separating fees from fines is whether the charge compensates the state for costs incurred as the result of prosecution of the defendant, in which case the cost is a fee. Compensation for labor or services, especially professional services that are collateral consequences of the defendant's

conviction, are fees.

A statute that authorizes the court to impose an additional $500 fine on offenders convicted of certain sex offenses provides that 10% of the assessment is to be retained by the circuit court clerk to cover costs incurred in administrating and enforcing the statute, and that this penalty should not be considered part of the fine. 730 ILCS 5/5-9-1.15. This part of the assessment is a fee since it constitutes compensation for services and costs that are a consequence of defendant's conviction. Imposition of this fee is not barred by *ex post facto* principles.

The statute also provides that $100 of the $500 fine should be provided to the State's Attorney who prosecuted the case. This part of the fine is a fee as it is compensation for professional services and therefore also not affected by *ex post facto* principles.

The remaining $350, which by statute is deposited into the Sex Offender Investigation Fund, is a fine. Because the statute authorizing the fine was not in effect when the offense was committed, it may not be assessed against the defendant.

(Defendant was represented by Assistant Defender Jaime Montgomery, Elgin.)

People v. Gillespie, 2012 IL App (4th) 110151 (No. 4-11-0151, 8/29/12)

An unconstitutional amendment to a statute is void *ab initio*. The effect of enacting an unconstitutional amendment to a statute is to leave the law in force as it was before the adoption of the amendment. The void amendment is not validated by a subsequent amendment of a different statute, even if it alters the statutory scheme to address the unconstitutional amendment.

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the Illinois Supreme Court held that the penalty for armed robbery while armed with a firearm violated the proportionate-penalties clause because it was more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or II weapon. Armed robbery with a firearm was a Class X offense punishable by a term of 6 to 30 years' imprisonment with a mandatory 15-year add-on, for a total of 21 to 45 years, while armed violence carried a penalty of only 15 to 30 years' imprisonment.

P.A. 95-688 subsequently amended the armed violence statute so as to make it impossible to base an armed violence conviction on robbery. The amendment did not alter the 15-year enhancement for armed robbery committed with a firearm that had been found unconstitutional in **Hauschild**.

Disagreeing with the conclusion reached by the court in **People v. Brown**, 2012 IL App (5th) 100452, the Appellate Court concluded that the armed-violence statute did not revive the 15-year enhancement. Even though the effect of P.A. 95-866 was to change the statutory scheme to remedy the proportionate-penalties violation, it left the armed-robbery statute unchanged and therefore could not validate the void statute.

(Defendant was represented by Assistant Defender Jacqueline Bullard, Springfield.)

People v. Hunter, 2016 IL App (1st) 141904 (No. 1-14-1904, modified upon denial of rehearing 8/12/16)

1. Defendant, age 16 at the time of the offense, was tried as an adult under the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130), and was convicted of armed robbery, aggravated kidnaping, and aggravated vehicular hijacking. The trial court sentenced him to 21 years imprisonment, which included a 15-year enhancement for his use of a firearm.

Defendant argued that he should be resentenced under the provisions of 730 ILCS 5/5-4.5-105 which took effect while his case was on appeal. Defendant argued that these provisions, which require the sentencing court to consider several factors, including age, impetuosity, and level of maturity when sentencing a defendant under age 18, should apply retroactively to his case. Defendant also argued that if the statute was not applied retroactively, the mandatory firearm enhancement violated the Eighth Amendment and the proportionate penalties clause of the Illinois Constitution.

Defendant also argued that the amendments to the automatic transfer statute, 705 ILCS 405/5-130(1)(a), which also took effect while defendant's case was on appeal and which removed the offenses of

armed robbery, aggravated kidnaping, and aggravated vehicular hijacking from the automatic transfer statute, should be applied retroactively to his case.

The court rejected all of defendant's arguments.

2. First, the court held that section 5-4.5-105 did not apply retroactively to defendant's case. Section 5-4.5-105 states that the sentencing court must consider certain sentencing factors "on or after the effective date of this amendatory act." Thus the statute clearly indicates that a court is required to apply its provisions only at hearings held on or after its effective date of January 1, 2016. Since defendant was sentenced before that date, section 5-4.5-105 did not apply to his case.

3. Second, the court held that the mandatory firearm enhancement was not unconstitutional as applied to defendant. Once the 15-year enhancement was applied, the sentencing range for defendant's offenses was only 21 to 45 years, a substantial penalty but not one comparable to a life sentence. Additionally, the trial court considered substantial mitigating evidence before imposing the minimum sentence of 21 years for each of defendant's convictions. Under these facts, the mandatory firearm enhancement did not violate the Eighth Amendment or the proportionate penalties clause.

4. Finally, the court held that the amendments to section 5-130 of the Juvenile Court Act did not apply retroactively. Statutes like section 5-130, which do not themselves contain a clear indication of legislative intent regarding temporal reach, are presumed to be framed in view of section 4 of the Statute on Statutes. Under section 4, a procedural amendment may not be applied retroactively if it would have a retroactive impact that would impair the rights a party possessed when acting, attach new legal consequences, or impose new duties with respect to transactions already completed.

The court held that applying the amendments retroactively would have a retroactive impact as it would abolish automatic transfers and require the State to file new petitions for criminal jurisdiction or suffer the legal consequences from failing to do so.

(Defendant was represented by Assistant Defender Katie Anderson, Chicago.)

People v. Ortiz, 2016 IL App (1st) 133294 (No. 1-13-3294, 10/17/16)

Defendant, age 15 at the time of the offense, was tried as an adult under the automatic transfer provision of the Juvenile Court Act. (705 ILCS 405/5-130)

The court held that the recent amendments to the automatic transfer provisions applied retroactively to defendant's case. These amendments took effect while defendant's case was on appeal and raised the minimum age for mandatory transfer to criminal court from 15 to 16 years. The court found that where, as here, the legislature does not provide an explicit provision establishing the effective date of the amendments, the general savings clause of section 4 of the Statutes on Statutes (5 ILCS 70/4) applies, and states that amendments that are procedural in nature may be applied retroactively. The amendments to the automatic transfer statute are procedural in nature and thus may apply retroactively to defendant's case.

The court vacated defendant's sentence and remanded the cause for the State to have the opportunity to file a petition for a discretionary transfer to adult court.

(Defendant was represented by Assistant Defender Elena Penick, Elgin.)

People v. Smith, 2014 IL App (1st) 103436 (No. 1-10-3436, 7/17/14)

Defendant was convicted of first-degree murder, attempt first-degree murder, and armed robbery, and was sentenced to consecutive terms of 45, 30, and 21 years. The court accepted the State's concession that in sentencing defendant for armed robbery, the trial court erroneously imposed a 15-year enhancement based on the fact that defendant was armed with a firearm.

The 15-year-enhancement was held unconstitutional in **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), but was revived by Public Act 95-688. **People v. Blair**, 2013 IL 114122. The court concluded that the revived enhancement did not apply in this case, however, because P.A. 95-688 became effective after the offense was committed. Thus, the enhancement was revived after the occurrence of the criminal conduct for which defendant was charged.

Generally, an amendment to a statute is presumed to apply prospectively rather than retroactively. This presumption may be rebutted by either express statutory language or necessary implication. A statute which specifies that it is to take effect upon becoming a law does not contain a clear expression of legislative intent that it is to apply retroactively.

Because the proportionate penalties violation identified in **Hauschild** had not been cured at the time of the criminal conduct in question, the 15-year enhancement had not been revived. The sentence for armed robbery was vacated and the cause remanded for re-sentencing.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

People v. Sprind, 403 Ill.App.3d 772, 933 N.E.2d 1197, 2010 WL 317230 (5th Dist. 2010)

Both the federal and state constitutions prohibit *ex post facto* laws that: 1) criminalize an act that was innocent when done; 2) increase punishment for an offense previously committed; and 3) alter rules of evidence to make a conviction easier by making substantive changes in the evidence needed to convict for a given offense. A statute that does nothing more than authorize the admission of evidence of a particular kind that was not admissible under the rules of evidence as enforced at the time the offense was committed is not an *ex post facto* violation.

At the time that defendant was arrested for aggravated DUI and reckless homicide, regulations applicable to the collection of blood and urine evidence provided that a disinfectant that does not contain alcohol shall be used to clean the skin where the sample of blood is to be collected, and that the urine sample shall be collected by the arresting officer, another law enforcement officer or agency employee. Those regulations were thereafter amended to provide that blood samples be drawn using proper medical technique, and to allow hospital nurses to collect urine samples. Because these changes in the regulations were procedural and did not involve substantive rights, they could be applied retroactively.

People v. Vlahon, 2012 IL App (4th) 110229 (No. 4-11-0229, 10/11/12)

Both the United States and Illinois Constitutions prohibit the State from enacting *ex post facto* laws. U.S. Const. Art. I, §10; Ill. Const. 1970, Art. I §16. A criminal law runs afoul of the prohibition against *ex post facto* laws if it is retroactive and disadvantageous to the defendant. A law disadvantages a defendant if it criminalizes an act that was innocent when done, increases the punishment for a previously committed offense, or alters the rules of evidence by making a conviction more easy to obtain. To establish an *ex post facto* violation based on an increase in punishment, defendant must demonstrate: (1) a legislative change; (2) the change imposed a punishment; and (3) the punishment is greater than the punishment that existed at the time the crime was committed.

At the time of defendant's commission of aggravated domestic battery in 2009, the Code of Corrections provided for an MSR term of two years for a Class 2 felony, including aggravated domestic battery. 730 ILCS 5/5-8-1(d)(2) (2008). In 2010, the legislature added a provision to the Code effective January 1, 2010, providing for a four-year MSR term for aggravated domestic battery. 730 ILCS 5/5-8-1(d)(6) (2010). In 2011, defendant was sentenced to a four-year MSR term for aggravated domestic battery.

Application of the four-year MSR term to defendant was an *ex post facto* violation. The new provision was a legislative change. The legislative change increased defendant's punishment, even though it also protected the public. The change did not merely modify a condition of defendant's sentence. As a result, defendant was sentenced to a longer MSR term than provided for by the statute in effect at the time of the offense, subjecting him to the custody of the IDOC for two years longer than he could have been under the statute in effect at the time of the offense.

The Appellate Court remanded with directions to modify the sentencing judgment to reflect a two-term of MSR.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

Top

§48-3
Constitutionality of Statutes

§48-3(a)
Generally

County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979) A party has standing to challenge the constitutionality of a statute only insofar as it has an adverse impact on his own rights. If there is no defect in the application of a statute to a litigant, he lacks standing to argue that the statute would be unconstitutional if applied to third parties in hypothetical situations. An exception to this standing rule exists for statutes that broadly prohibit speech protected by the First Amendment.

Shaw v. Murphy, 523 U.S. 223, 121 S.Ct. 1475, 149 L.Ed.2d 420 (2001) Under Turner v. Safely, 482 U.S. 78 (1987), restrictions on the rights of prison inmates are constitutional if reasonably related to legitimate and neutral government objectives. Four factors to be considered in making this determination include: (1) whether there is a valid, rational connection between the regulation and the legitimate and neutral government interest put forward to justify it; (2) whether alternative means of exercising the right are available to inmates; (3) the impact of accommodating the constitutional right on guards and other inmates and on the allocation of prisoner resources; and (4) whether there are alternatives for prison officials to achieve the governmental objectives. If there is no valid, rational connection between the prison regulation and the governmental interest put forward to justify it, the regulation is improper without regard to the other three factors.

Inmates do not have a First Amendment right to give legal advice to other inmates,. The determination under **Turner** is not affected by the fact that the communication between inmates concerned a legal defense to a charge of assaulting a guard. **Turner** depends not on the content of communication in question, but on the relationship between the "asserted penological interest" and the regulation. In addition, prison officials are to be the "primary arbiters" of problems which arise in prison management; affording First Amendment protection to inmate communications regarding legal advice would undermine the ability of officials to administer prisons.

Virginia v. Black, 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003) Because First Amendment protections are not absolute, the government may constitutionally regulate certain categories of expression. The First Amendment permits restrictions upon the content of speech which is of "such slight social value . . . that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality." Thus, the government may constitutionally regulate fighting words and statements intended to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals (i.e., "true threats").

Similarly, a State may ban cross burning performed with the intent to intimidate. Because "burning a cross is a particularly virulent form of intimidation," a state statute outlawing cross burnings performed "with the intent of intimidating any person or group of persons" would not offend the First Amendment.

However, a plurality of the court held that a Virginia statute was unconstitutional on its face by the addition of a provision that the act of burning a cross "shall be prima facie evidence of an intent to intimidate a person or group of persons." Although burning a cross has historically been associated with intimidation and threats of violence, it may also "mean only that the person is engaged in core political speech." The prima facie provision "strips away the very reason why a State may ban cross burning with the intent to intimidate," and results in an unacceptable risk that acts performed without any intent to intimidate could be punished.

Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) Even where First Amendment rights are involved, the mere existence of a "chilling effect" is not sufficient basis, in and of itself, for prohibiting state action. A statute can be upheld if its effect on free speech is minor in relation to the need for control of the conduct and the lack of alternative means to do so.

Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971) First Amendment was violated by disturbing the peace conviction; defendant entered courthouse wearing jacket with slogan "fuck the draft."

Ashcroft v. Free Speech Coalition et al., 535 U.S. 234, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) Congress may prohibit "virtual child pornography," which portrays sexually explicit images appearing to depict minors but which were in fact produced without using real children, only if the material is "obscene" under **Miller v. California**, 413 U.S. 15 (1973).

Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) Public school students who face a 10-day or less suspension from school are entitled to due process, which requires at the least oral or written notice, an explanation of the evidence the authorities have (if the charges are denied by the student), and an opportunity to present his side of the story.

Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967) State statute prohibiting interracial marriage is unconstitutional as violative of equal protection and due process.

Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) State law which required suspension of driver's license of uninsured motorist involved in accident unless he posted security of the amount of damages claimed by aggrieved party, regardless of fault and without a hearing, is unconstitutional. Compare, **Jennings v. Mahoney**, 404 U.S. 25, 92 S.Ct. 180, 30 L.Ed.2d 146 (1971).

Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) State statute which makes it a crime (punishable by up to one year imprisonment) to be addicted to narcotics is unconstitutional as cruel and unusual punishment.

Powell v. Texas, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968) Conviction under state statute making it a crime to be drunk in a public place upheld. Chronic alcoholism was not a defense.

Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971) State statute which allowed various state officials to post, in liquor stores, the names of persons to whom liquor may not be sold because of their prior excessive drinking invalidated. Due process requires that such a person be given notice and opportunity to be heard before such posting; where a person's good name, reputation, honor or integrity is at stake because of what the government is doing, notice and opportunity to be heard are essential.

U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968) Federal statute creating a crime for knowingly destroying or mutilating a draft card upheld.

Schacht v. U.S., 398 U.S. 58, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970) Federal law which prohibits the wearing of a military uniform without authority, but which authorizes actors to wear such uniforms in productions except in portrayals which tend to discredit the Armed Forces, is unconstitutional.

U.S. v. Lopez, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) Congress exceeded its Commerce Clause powers when it enacted statute, which created a federal offense for knowingly possessing a firearm within 1,000 feet of a school. Congress may regulate an activity under the Commerce Clause only where

there is a rational basis to believe that the activity substantially affects interstate commerce. Congress made no finding that the possession of firearms near schools has any effect on interstate commerce; if the broad justifications offered by the government were accepted, one would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate."

People v. Bryant, 128 Ill.2d 448, 539 N.E.2d 1221 (1989) A constitutional challenge to a statute may be raised at any time, including for the first time on appeal. See also, People v. Zeisler, 125 Ill.2d 42, 531 N.E.2d 24 (1988) (constitutionality of statute raised for the first time in a post-conviction proceeding).

People v. Gean, 143 Ill.2d 281, 573 N.E.2d 818 (1991) Absent a clear indication that the legislature intended to create an absolute liability offense, courts should be unwilling to interpret a statute as creating such. The mere absence of language defining an express mental state does not mean that none is required. When a statute does not state a specific mental state, but also does not create an absolute liability offense, the court must determine whether intent, knowledge or recklessness applies. See also, People v. Tolliver, 147 Ill.2d 397, 589 N.E.2d 527 (1992).

People v. Zuniga, 31 Ill.2d 429, 202 N.E.2d 31 (1964) A person who would attack a statute as unconstitutional must bring himself within the class as to whom the law is allegedly constitutionally objectionable.

People v. Matkovick, 101 Ill.2d 268, 461 N.E.2d 964 (1984) A defendant charged with conduct clearly prohibited by a statute has no standing to challenge the statute on vagueness grounds, based on hypothetical situations, unless the statute has First Amendment implications.

People v. Mayberry, 63 Ill.2d 1, 345 N.E.2d 97 (1976) A party does not have standing to challenge the constitutional validity of a statute that does not directly affect him, unless the unconstitutional feature is so pervasive as to render the entire act invalid.

People v. Haywood, 118 Ill.2d 263, 515 N.E.2d 45 (1987) A person to whom a statute may be constitutionally applied does not have standing to challenge that statute as overbroad on the ground that it might be applied unconstitutionally to others in a different context.

People v. Taylor, 138 Ill.2d 204, 561 N.E.2d 667 (1990) When a penal statute which does not involve first amendment freedoms is challenged as unconstitutionally vague on its face, the challenger must demonstrate that the law is impermissibly vague in all of its applications.

Talsky v. Dept. of Registration, 68 Ill.2d 579, 370 N.E.2d 173 (1977) Ordinarily, a litigant is permitted to bring First Amendment overbreadth attacks against a statute without demonstrating that his particular conduct is protected. The rationale for this rule is to fully protect permissible speech that might otherwise be inhibited by an overbroad statute.

Carbondale v. Brewster, 78 Ill.2d 111, 398 N.E.2d 829 (1979) The legislature may exercise police power to protect the public health, safety, or morals and general welfare or convenience. To be a valid exercise of police power, the legislation must bear a reasonable relationship to the interest sought to be protected, and the means adopted must constitute a reasonable method to accomplish such objective.

People v. Jones, 188 Ill.2d 352, 721 N.E.2d 546 (1999) 625 ILCS 5/12-611, which prohibited operation of a sound system which could be heard more than 75 feet from the vehicle unless an emergency vehicle or a vehicle "engaged in advertising" was involved, violated the First Amendment because it was a content-based

restriction of protected speech and was not justified by a compelling State interest.

As part of its interest in regulating noise, a State may impose reasonable restrictions on the time, place or manner of constitutionally protected speech in a public forum. A statute which regulates constitutionally-protected speech, but which is content-neutral, is subjected to an "intermediate level of scrutiny." Under this type of analysis, the regulation is upheld if it is "narrowly tailored to serve a significant governmental interest" and leaves open "ample alternative channels for communication of the information."

Where a regulation restricts speech based on its content, however, it is subjected to the "most exacting scrutiny." Such a regulation is presumed to be invalid and can be upheld "only if necessary to serve a compelling governmental interest and narrowly drawn to achieve that interest."

Section 12-611 was clearly content-based because it expressly provided that the prohibition on sound amplification systems did not apply to advertising. The "permissible degree of amplification is dependent on the nature of the message being conveyed."

Thus, §12-611 could be upheld only if it served a compelling State interest, an argument which the State declined to make. See also, **People v. Sanders**, 182 Ill.2d 524, 696 N.E.2d 1144 (1998) (First Amendment was violated by 720 ILCS 125/2(c), which prohibited disturbing a person "engaged in the lawful taking of a wild animal . . . with intent to dissuade or otherwise prevent the taking," because government may not prohibit speech based on content unless the prohibition is both justified by a compelling State interest and narrowly tailored to achieve that interest; "[s]ubjecting to criminal liability expression which is made with an intent to dissuade, while failing to threaten punishment for expressions intended to encourage or persuade, constitutes an illegal legislative censure of opinion").

People v. White, 116 Ill.2d 171, 506 N.E.2d 1284 (1987) Provision in the Election Code which prohibits distribution of a leaflet soliciting votes for a political candidate in a general election, without including the name and address of the person publishing and distributing it, is "unconstitutional on its face" because it imposes an unlawful restriction on the right to express political views.

People v. Diguida, 152 Ill.2d 104, 604 N.E.2d 336 (1992) Defendant was convicted of criminal trespass to real property after he refused to leave the cart-control area of a grocery store, where he had been soliciting signatures for a political nominating petition. He claimed that the Illinois constitutional rights to free speech (Art. I, §4) and free and equal elections (Art. III, §3) precluded use of the criminal trespass law to prevent the collection of nominating signatures.

Although there is no express reference to State action in the free speech provision of the Illinois Constitution, that provision was intended to restrict only actions taken by the State. Restriction of soliciting on private property is "State action" only if the property has been presented as a forum for free expression. There was no evidence that the grocery store had ever presented its property in such a fashion; defendant was told that he was on private property and would have to leave, and he responded by circling the block to avoid police. Although the store allowed customers to post notices on a bulletin board, grocery store bulletin boards are not normally regarded as forums for the exchange of ideas.

Finally, use of the state's criminal trespass law was not "State action" where the law was used primarily to remove defendant from private property, and any restriction on free speech was purely incidental.

The State constitutional right to free and equal elections protects the gathering of nominating signatures on private property only if the petition circulator would be denied equal access to voters if he remained on public property. Defendant could not make such a showing in this case, as he could have moved to a public sidewalk located only a few steps away.

People v. Russell, 158 Ill.2d 22, 630 N.E.2d 794 (1994) Ch. 38, ¶12-16.2(a)(1) (720 ILCS 5/12-16.2(a)(1)), which provides that a carrier of the HIV virus commits a Class 2 felony by knowingly transmitting the virus through intimate contact, neither violates the First Amendment right to free speech and association nor is

unconstitutionally vague. The statute has no connection to free speech, the right to free association could not apply to these cases (in which the victim was unaware of defendant's HIV-positive status and the intimate contact was achieved through force), and the statute is sufficiently clear that a person of ordinary intelligence need not guess at its meaning.

In re K.C., 186 Ill.2d 542, 714 N.E.2d 491 (1999) 625 ILCS 5/4-102, which creates a Class A misdemeanor (Class 4 felony for a subsequent offense) where, without authority, a person damages, removes or tampers with any part of a vehicle, violates due process by punishing what may be wholly innocent conduct without requiring a culpable mental state.

People v. Wright, 194 Ill.2d 1, 740 N.E.2d 755 (2000) Due process was violated by 625 ILCS 5/5-401.2(a)(i), which provided that certain persons engaged in auto recycling commit a Class 2 felony if they "knowingly" fail to keep certain records or "knowingly" violate "this Section."

By requiring a system of mandatory licensing and record keeping, §5-401.2 is intended to prevent or reduce the transfer or sale of stolen vehicles and their parts. Section 5-401.2 was not reasonably designed to achieve this purpose, however, because punishing an individual for knowingly failing to keep required records may subject completely innocent conduct to criminal punishment.

The court declined to cure the defect by imputing a requirement of knowledge plus criminal purpose under People v. Tolliver, 147 Ill.2d 397, 589 N.E.2d 527 (1992). Where a statute specifically provides a mental state, as with §5-401.2, courts may not impute a different requirement.

Defendant did not waive the constitutionality of §5-401.2 although he raised the issue for the first time in a petition for rehearing in the Supreme Court. New points are generally improper in a petition for rehearing; however, the constitutionality of a statute may be raised any time.

People v. Fisher, 184 Ill.2d 441, 705 N.E.2d 67 (1998) Due process is not violated by provisions of the Illinois Vehicle Code which impose a two-year-suspension of a driver's license for a non-first-time offender who refuses to submit to chemical testing after an arrest for DUI, but require only a one-year-suspension for persons who submit to testing and are found to have a blood-alcohol content in excess of the legal limit, or by provisions permitting a non-first-time offender who fails chemical testing to apply for a hardship driving permit after 90 days while prohibiting the issuance of hardship permits for non-first offenders who refuse to submit to chemical testing. The distinction between drivers who refuse to submit to chemical testing and those who fail such testing is rationally related to the goal of improving highway safety, because it provides an incentive for drivers to comply with implied consent laws and promotes highway safety by permitting authorities to remove impaired drivers from the highways.

Due process is not violated because there may be a delay of up to 14 days between the effective date of a summary suspension of a driver's license and the date of the evidentiary hearing. Although drivers have strong interests in the continued possession of their driver's licenses, and "[a]t some point, a delay in a post-deprivation hearing may . . . become a constitutional violation," a delay of 14 days is justified by the need to manage the "extensive" summary suspension hearings provided by Illinois law.

People v. Woodrum, 223 Ill.2d 286, 860 N.E.2d 259 (2006) To comply with due process, a criminal statute must provide sufficient notice of the prohibited conduct to provide fair notice and prevent arbitrary enforcement. The phrase "other than a lawful purpose," as used in the child abduction statute, implies actions which violate the Criminal Code, and gives adequate notice of the type of conduct that will subject a person to criminal penalties.

The First Amendment prohibits the government from regulating mere thought. However, a criminal statute which regulates thought plus conduct does not implicate the First Amendment. The child abduction statute prosecutes actions - luring children to a secluded place without their parents' consent - and does not prosecute based solely on one's sexual fantasies or thoughts.

Finally, an unconstitutional presumption could be severed from the remainder of the child abduction statute.

People v. Fuller, 187 Ill.2d 1, 714 N.E.2d 501 (1999) Class 2 felony penalty for filing a false report of a vehicle theft does not violate due process. The classification of an offense violates due process if it bears no rational relationship to a legitimate State interest. There is a rational relationship between the Class 2 penalty and the State's interest in preventing innocent persons from being falsely accused of auto theft.

Also, due process does not require that a particular defendant's motive in violating a statute be related to the State's interest in enacting the statute; "the defendant's reasons for filing the false report may be relevant to the determination of the particular sentence she might receive for her misconduct, but . . . do not render the classification of her offense unconstitutional as applied to her."

People v. Falbe, 189 Ill.2d 635, 727 N.E.2d 200 (2000) 720 ILCS 570/401(c)(2), which enhances possession of cocaine with intent to deliver to a Class X felony where the offense occurs on a public way within 1,000 feet of a church, does not violate the "establishment of religion" clauses of the United States or Illinois Constitutions. Whether the establishment clauses have been violated is determined by the three-part test adopted in **Lemon v. Kurtzman**, 403 U.S. 602 (1971), under which a statute satisfies the establishment clause where its legislative purpose is secular, its primary effect neither advances nor inhibits religion, and it does not foster excessive governmental "entanglement with religion."

The **Lemon** test was satisfied here: (1) the purpose of the enhancement statute was secular (to protect "particularly vulnerable" segments of society from narcotics activity), (2) the primary effect of the statute is to prevent drug trafficking rather than to advance religion, and (3) defendants stipulated they were within 1,000 feet of a church, making it unnecessary to consider whether the definition of a "place of worship" was so uncertain as to create "excessive governmental entanglements between church and state."

In re M.T., 221 Ill.2d 517, 852 N.E.2d 792 (2006) The indecent solicitation of an adult statute (720 ILCS 5/11-6.5(a)) is applicable to a juvenile perpetrator. The indecent solicitation of an adult statute, which defines the offense as arranging "for a person 17 years of age or older to commit an act of sexual penetration" or sexual conduct with a person who is under the age of 17, does not violate due process.

First, defendant had standing to challenge the constitutionality of the solicitation of an adult statute. The standing requirement is intended to ensure that only parties with a genuine interest in the outcome of a case will litigate issues, and is determined on the circumstances of the particular case. Although the minor was sentenced as a juvenile, he was within the class of persons affected by the statute because he was challenging the validity of the statute on which his adjudication was based. Therefore, he had standing.

Due process is not violated because solicitation of an adult is a felony while the underlying sexual offense is only a misdemeanor. To survive a due process challenge, a penalty must be reasonably designed to remedy the particular evil that the legislation was intended to target. One goal of the indecent solicitation of a child statute is to protect children by allowing prosecution of persons who endanger children by arranging for adults to engage in sexual conduct with them. Because imposing felony liability for arranging any sex offense with a minor is reasonably related to this goal, and because a person who arranges for sexual offenses against children may cause sexual offenses to be committed against multiple children, due process is not violated by the fact that arranging a misdemeanor offense constitutes a felony.

The indecent solicitation of an adult statute does not violate due process because it lacks a culpable mental state, and might therefore punish persons who arrange completely innocent meetings between adults and minors. The person who makes the solicitation must know that the intent of the meeting is to commit a sexual offense against a child.

Finally, the statute does not violate due process although it has no requirement that defendant know or should have known the ages of the child and the adult who was solicited. Because defendant raised a facial challenge to the statute, he was required to show that the statute would be invalid under any imaginable set

of circumstances. Because "it is a simple exercise to imagine a factual scenario where the physical appearances would readily establish the victim's ages as under 17 and the solicited adult's age as over 17," the facial challenge fails.

People v. Johnson, 225 Ill.2d 573, 870 N.E.2d 415 (2007) Due process was not violated because perpetrators of non-sexually motivated offenses were designated as "sexual offenders" and required to register as such.

People v. Alexander, 204 Ill.2d 472, 791 N.E.2d 506 (2003) The child pornography statute is unconstitutional because the ban on "virtual" child pornography exceeded the legislature's authority, however, the "virtual" child pornography section is severable from the remainder of the child pornography statute.

People v. Pomykala, 203 Ill.2d 198, 784 N.E.2d 784 (2003) Provisions which are complete in and of themselves, and capable of being executed independently, may be severed and applied despite the unconstitutionality of a related provision.

People v. Funches, 212 Ill.2d 334, 818 N.E.2d 342 (2004) For purposes of aggravated unlawful failure to obey a police officer's order, a theft need not be recent in order to justify an inference of knowledge arising from possession of a stolen vehicle.

People v. Brown, 225 Ill.2d 188, 866 N.E.2d 1163 (2007) Transfer of a juvenile to adult court was void where it was based on a provision subsequently found to have been unconstitutionally enacted. Upon remand the law in effect prior to enactment of the unconstitutional Act should apply to the transfer hearing.

In re F.G., 318 Ill.App.3d 709, 743 N.E.2d 181 (1st Dist. 2000) Where a statute is deemed unconstitutional in its entirety, it is void "ab initio." Thus, the law that was in effect before the unconstitutional statute was enacted is revived.

People v. Rokicki, 307 Ill.App.3d 645, 718 N.E.2d 333 (2d Dist. 1999) The Illinois Hate Crime Statute (720 ILCS 5/12-7.1) does not impermissibly chill free speech where the predicate offense is disorderly conduct. The statute does not infringe on an individual's right to hold unpopular beliefs, but merely punishes an offender who allows such beliefs to motivate criminal conduct. The statute is not a content-based classification and does not chill free speech because individuals might be deterred from expressing unpopular views out of fear that their views will later be used in a prosecution.

People v. Jamesson, 329 Ill.App.3d 446, 768 N.E.2d 817 (2d Dist. 2002) 720 ILCS 5/25-1.1, which defines the offense of "unlawful contact with street gang members" as knowingly having direct or indirect contact with a street gang member after having been sentenced to supervision, probation, or conditional discharge with a condition to refrain from such contact, does not restrict the First Amendment right of association. The constitutional right to freedom of association does not apply to unlawful conduct.

People v. Stork, 305 Ill.App.3d 714, 713 N.E.2d 187 (2d Dist. 1999) 720 ILCS 5/11-9.3(a)(b), which prohibits a child sex offender from knowingly being present on school property or loitering on a public way within 500 feet of school property while persons under the age of 18 are present, unless the offender is the parent or guardian of a student on school property or has permission to be present, does not violate procedural or substantive due process.

People v. Grant, 339 Ill.App.3d 792, 791 N.E.2d 100 (1st Dist. 2003) Aggravated unlawful use of a weapon statute (720 ILCS 5/24-1.6(a)(1)(3)(A)) does not violate due process because it does not require a culpable

mental state, and therefore could result in the criminalization of innocent conduct. Aggravated UUW is committed when defendant knowingly carries in a vehicle an uncased, loaded and immediately accessible firearm. Thus, §24-1.6 expressly provides a mental state of knowledge.

Legislation which does not involve a fundamental constitutional right satisfies substantive due process where it bears a rational relationship to a legitimate state goal. §24-1.6 is rationally related to a legitimate state goal. The purpose of the aggravated UUW statute is to protect police officers and the general public by imposing a more harsh penalty against persons who do not fall under any specific exemption to the UUW statute and who carry loaded weapons in the passenger compartment of a vehicle. The aggravated UUW statute is reasonably designed to achieve that purpose, and does not permit punishment of innocent conduct.

People v. Leroy, 357 Ill.App.3d 530, 828 N.E.2d 769 (5th Dist. 2005) 720 ILCS 5/11-9.4(b-5), which prohibits persons convicted of sex offenses against children from knowingly residing within 500 feet of a playground or facility providing programs or services exclusively directed towards persons under 18 years of age, but which excepts offenders who owned the property in question before the effective date of the statute, does not violate substantive due process, procedural due process, equal protection, the ex post facto clause, the right against self-incrimination, or the Eighth Amendment prohibition of cruel and unusual punishment. Also, the statute is not overly broad.

People v. Torres, 327 Ill.App.3d 1106, 764 N.E.2d 1206 (5th Dist. 2002) Due process is not violated by the Illinois statutory scheme creating mutually exclusive offenses of burglary and residential burglary. Imposition of a higher penalty for the burglary of home clearly has a "reasonable relationship" to a State interest.

People v. Andrews, 364 Ill.App.3d 253, 845 N.E.2d 974 (2d Dist. 2006) The 15-year enhancement for aggravated vehicular hijacking while carrying a firearm, which was found to be unconstitutional under the proportionate penalties clause, could not be severed from the substantive offense of aggravated vehicular hijacking.

People v. Diestelhorst, 344 Ill.App.3d 1172, 801 N.E.2d 1146 (5th Dist. 2003) 720 ILCS 5/11-9.4(a), which prohibits a child sex offender from approaching, contacting or communicating with a child under the age of 18 unless the offender is a parent or guardian of the person in question, is neither a violation of substantive due process nor unconstitutionally vague.

People v. Thoennes, 334 Ill.App.3d 320, 777 N.E.2d 1075 (4th Dist. 2002) 720 ILCS 5/32-5.1, which creates the offense of false impersonation of a peace officer where a person knowingly and falsely represents himself to be a peace officer of any jurisdiction, does not violate due process and is not overbroad.

The legislature has wide discretion to establish penalties for criminal offenses. Legislation which does not affect fundamental constitutional rights complies with substantive due process test if: (1) it bears a reasonable relationship to the public interest to be served, and (2) the means adopted are a reasonable method of accomplishing the desired objective.

Section 32-5.1 is intended to protect the public from being deceived into believing that an individual who falsely represents himself to be a peace officer has authority to act in an official capacity. The State has a legitimate interest in protecting the public in such circumstances, even if the individual has no criminal intent, because a person who knowingly and falsely represents himself to be a peace officer may create situations that endanger the public.

The statute does not allow innocent conduct to be punished. Because the crime requires that the perpetrator knowingly and falsely represent himself to be a peace officer, it does not apply to an actor or Halloween masquerader who has no intent to deceive the public.

In re Derrico G., 2014 IL 114463 (No. 114463, 8/4/14)

Under §5-615 of the Juvenile Court Act, the State may object to the entry of an order of continuance under supervision in a juvenile case. 705 ILCS 405/5-615. The circuit court held that this statutory provision was unconstitutional both facially and as applied. The Illinois Supreme Court reversed the circuit court's ruling, holding that the statute was neither facially unconstitutional nor as applied to defendant.

1. For a statute to be facially unconstitutional, there must be no set of circumstances under which the statute would be valid. If a statute is constitutional as applied to a defendant, it usually cannot be challenged on the ground that it might be unconstitutional as applied to others. In other words, if the statute is constitutional as applied to defendant, "his facial challenge necessarily fails."

2. The separation of powers clause of the Illinois Constitution provides that none of the three branches of government "shall exercise powers properly belonging to another." Ill. Const. 1970 art. II, §1. The purpose of this provision is to ensure that the whole power of more than one branch does not reside in the same hands. But the provision was not designed to achieve a complete divorce among the three branches, and it does not divide governmental powers into rigid, mutually exclusive compartments. The three branches are parts of a single operating government and there will be areas where their functions overlap. As such, the separation of powers clause was not designed to effect a complete divorce between the branches.

The defendant argued that the prosecution's discretion to object to supervision infringed on the circuit court's sentencing authority. The Supreme Court rejected this argument, noting that it had previously decided that a statute which allowed prosecutors to decide when a juvenile would be subjected to prosecution as an adult did not violate separation of powers even though the statute gave the prosecution significant discretion to dictate the range of penalties to which a juvenile would be subject. The discretionary authority afforded the prosecution by §5-615 "pales by comparison."

Furthermore, under the version of the statute in effect here, the court may only continue the case under supervision before proceeding to adjudication. Thus, the State's objection must also occur before adjudication. Because defendant had not been adjudicated when the State objected and sentencing was not an issue, the State did not infringe on the court's right to impose sentence.

3. The equal protection clause requires the government to treat similarly situated individuals in a similar fashion unless it can demonstrate an appropriate reason to treat them differently. But the clause does not forbid the legislature from drawing proper distinctions among different categories of people unless it does so on the basis of criteria wholly unrelated to the legislation's purpose.

Defendant argued that equal protection was violated by the State's right to object to juvenile supervision but not adult supervision. The court rejected this argument on a number of grounds.

First, defendant could not show that he was similarly situated in all relevant aspects to the adult offenders he compared himself to. Equal protection does not forbid all classifications, only those that apply different treatment to people who are alike in all relevant respects. Here, defendant was not similarly situated to adult offenders charged with a felony, because such adult offenders are not eligible for supervision at all.

Second, defendant entered into a fully negotiated guilty plea. Having received significant consideration in return for his plea, defendant could not repudiate the very sentence he agreed to on the basis that it violated equal protection. The court found that defendant's position violated fundamental principles of fairness in the enforcement of guilty pleas.

Third, minors in delinquency proceedings are not comparable to adult offenders because they are generally not subject to the same deprivation of liberty. Delinquency proceedings are protective and intended to correct and rehabilitate rather than to punish. That difference extends to the role of the State.

The dissent would have held that as applied to this case, §5-615 violated the separation of powers clause. The circuit court had already accepted defendant's guilty plea when it continued the case under

supervision. Although the circuit court did not enter a finding of guilt, the acceptance of the guilty plea was itself a conviction. Conviction marks the traditional boundary beyond which the State's constitutionally permissible role in decisions affecting sentencing comes to an end. Accordingly, the State's objection to supervision violated the separation of powers doctrine.

In re Jonathan C.B., ___ Ill.2d ___, ___ N.E.2d ___ (2011) (No. 107750, 6/30/11)

1. The court rejected the argument that because minors accused of sex offenses are subject to more serious sanctions than other delinquent minors, they are entitled to jury trials as a matter of due process and equal protection under the Illinois and federal constitutions. The court acknowledged that minors accused of sex offenses are denied the benefit of confidentiality of court records, but noted that such minors have a diminished expectation of privacy. The court also noted that the lack of confidentiality and collateral consequences such as the requirement to submit DNA samples and ineligibility of expungement are related to rehabilitation because such measures identify persons who are at risk for recidivism.

Furthermore, delinquency adjudications for felony sex offense carry only indeterminate juvenile sentences and not more serious adult sentences. Finally, the court reiterated precedent that sex offender registration is a public safety measure rather than a punishment mandating the right to a jury trial, and found that in any event juvenile offender registration is less onerous than adult registration because the information is available to a smaller group of persons and juveniles may petition to terminate the registration requirement.

In rejecting defendant's argument, the court also found that accepting the minor's argument would offend principles of *stare decisis* by overruling long-standing precedent concerning the nature of juvenile delinquency proceedings. The minor "has failed to provide this court with good cause or compelling reasons to depart from our prior decisions."

2. The Court rejected the argument that because minors adjudicated delinquent of sex offenses are similarly situated to persons who have the right to a jury trial under extended juvenile jurisdiction and as adult offenders, the absence of the right to a jury trial in sex offense delinquency proceedings violates equal protection. The equal protection clause prohibits disparate treatment of similarly situated individuals. Unless fundamental rights are at issue, equal protection challenges are resolved under the "rational basis" test, which considers whether the challenged classification bears a rational relationship to a legitimate governmental purpose.

The court concluded that minors adjudicated delinquent for sex offenses cannot meet the threshold requirement of showing that they are similarly situated to either juveniles subjected to extended juvenile jurisdiction prosecutions or to adult sex offenders. Minors found delinquent under extended juvenile jurisdiction and adult sex offenders face severe deprivations of their liberty, including mandatory incarceration and adult sentences. By contrast, a minor adjudicated delinquent for a sex offense does not face the possibility of an adult criminal sentence, and instead receives a sentence that automatically terminates at age 21.

The court also rejected the argument that equal protection principles are triggered because juvenile sex offenders may face a future loss of liberty under the Sexually Violent Persons Act; commitment under the Act requires a separate, successful action by the State and proof of additional elements that are not common to all sex offenses.

Defendant's adjudications for criminal sexual assault and attempt robbery were affirmed.

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

In re M.I., 2013 IL 113776 (No. 113776, 5/23/13)

1. Whether a statutory command is mandatory or directory is a question of statutory construction that is reviewed *de novo*. Statutes are mandatory if the intent of the legislature dictates a particular consequence for the failure to comply with the provision. In the absence of such legislative intent, the statute is directory and no specific consequence flows from noncompliance. The use of the word "shall" is not determinative of the mandatory/directory question.

A presumption exists that language issuing a procedural command to a government official indicates that the statute is directory. This presumption is overcome when: (1) there is negative language prohibiting further action in the case of noncompliance; or (2) the right that the provision is designed to protect would be injured under a directory reading.

The Extended Juvenile Jurisdiction (EJJ) statute provides that a hearing on a State's motion to designate a proceeding as an EJJ proceeding "shall commence . . . within 30 days of the filing of the motion, unless good cause is shown . . . [in which case] the hearing shall be held within 60 days of the filing of the motion." 705 ILCS 405/5-810(2). While use of the word "shall" indicates that the court has an obligation to hold a hearing on the motion, use of that term does not control the mandatory/directory question. The EJJ statute is presumed directory because it issues a procedural command to a government official.

The presumption that the statute is directory is not overcome by either condition. The statute lacks any negative language prohibiting further action if the hearing is not held within 60 days. The right that the statute is designed to protect was not injured under a directory reading. The minor received notice of the motion and a hearing before being subject to an EJJ proceeding and has not shown how he was prejudiced by a hearing conducted outside the 60-day limit. The court rejected the minor's arguments that a mandatory reading would eliminate any "state of uncertainty" for the minor, unnecessary delays, and use of the motion as a litigation tactic.

2. To bring a constitutional challenge, a person must be within the class aggrieved by the alleged unconstitutionality, or the unconstitutional feature must be so pervasive as to render the entire statute invalid. A person has no standing to argue that the statute would be unconstitutional if applied to third parties in hypothetical situations.

Under the EJJ statute, the stay of an adult sentence may be revoked when the minor violates the conditions of his sentence, or is alleged to have committed a new offense. 705 ILCS 405/5-810(6). Although contained within the same statutory subsection, these are separate provisions with separate consequences.

A petition to revoke was filed against the minor solely on the basis of his commission of a new offense. Because the minor argued only that the term "conditions" is vague, and made no vagueness challenge to the alleged basis for revocation of the stay in his case, he has no standing to make a constitutional challenge to the statute.

(Respondent was represented by Assistant Defender Emily Filpi, Chicago.)

In re Veronica C., 239 Ill.2d 134, 940 N.E.2d 1 (2010)

Because a party may raise a constitutional challenge to a statute only if it affects him, the minor respondent lacked standing to argue that the separation of powers doctrine and equal protection are violated by 705 ILCS 405/5-615, which allows the State to block the trial court from granting a continuance under supervision. Because the proceeding had reached the adjudicatory stage, the controlling statute did not authorize supervision even had the State consented.

(Defendant was represented by Assistant Defender Steve Wiltgen, Elgin.)

People v. Aguilar, 2013 IL 112116 (No. 112116, modified 12/19/13)

1. The Second Amendment protects an individual's right to keep and bear arms for the purpose of self-defense, and is applicable to the states through the due process clause of the Fourteenth Amendment. While the need for self-defense is most acute in the home, the constitutional right to armed self-defense is broader than the right to have a gun in one's home. The Second Amendment guarantees not only the right to "keep" arms, but also the right to "bear" arms, which implies a right to carry a loaded gun outside the home. Because the Class 4 form of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A), (d)) categorically prohibits the possession and use of an operable weapon for self-defense outside the home, it violates the Second Amendment on its face.

In a footnote, in response to the State's rehearing petition, the court emphasized that its holding was limited to the Class 4 form of the statute, and it was making no finding, express or implied, with respect to

the constitutionality of any other section or subsection of the AUUW statute.

2. The right to keep and bear arms for self-defense is not unlimited and may be subject to reasonable regulation. The United States Supreme Court has not identified the possession of handguns by minors as conduct that may be constitutionally regulated, but laws banning the juvenile possession of firearms have been commonplace for almost 150 years, and comport with longstanding practice of prohibiting classes of persons whose possession poses a particular danger to the public from possessing firearms. While many colonies permitted or even required minors to own and possess firearms for purposes of militia service, no right for minors to own or possess firearms existed at any time in the history of the nation. Therefore, the unlawful possession of firearms statute prohibiting persons under 18 years of age from possessing any firearm of a size that may be concealed on the person (720 ILCS 5/24-3.1(a)(1)) comports with the Second Amendment.

The court reversed defendant's conviction for AUUW and affirmed his conviction for unlawful possession of a firearm.

Garmen, C.J., dissented upon the denial of rehearing. It would be preferable for the court in response to the State's rehearing petition to allow the parties to fully brief and argue the constitutionality of other sections and subsections of the statute.

Theis, J., dissented upon the denial of rehearing. The majority's unexplained modification of its decision upon denial of rehearing adopts an entirely new way of analyzing the constitutional claim by incorporating the sentencing provisions into its analysis. This new holding has the potential to alter the court's constitutional jurisprudence and create a host of practical problems for law enforcement. It is unsupported by any authority. Rehearing should have been granted to allow the parties to address whether the statute is unconstitutional in all of its applications.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Blair, 2013 IL 114122 (No. 114122, 3/21/13)

When a statute is held facially unconstitutional, *i.e.*, unconstitutional in all its applications, it is said to be void *ab initio*. Such a declaration by a court cannot, within the strictures of the separation of powers clause, repeal or otherwise render the statute nonexistent. Rather, the statute is only considered unconstitutional from the moment of its enactment, and therefore unenforceable, but it remains on the statute books.

Ordinarily, the only way that the legislature may then remedy the statute's infirmity is by amending or reenacting the statute that was held unconstitutional. This is not the only recourse, however, when the infirmity in the statute is that it violates the proportionate penalties clause under the identical elements test. In that case, the proportionality violation arises out of the relationship of two statutes – the challenged statute and the comparison statute. To cure the infirmity, the legislature may amend the challenged statute, the comparison statute, or both.

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the court held that the sentence for armed robbery while armed with a firearm, which included a 15-year mandatory enhancement, violated the proportionate penalties clause because it was more severe than the penalty for the identical offense of armed violence based on robbery with a category I or II weapon. The legislature's subsequent enactment of P.A. 95-688 (eff. 10/23/07), which amended the armed violence statute to eliminate robbery as a predicate offense, remedied the disproportionality and revived the sentencing enhancement for armed robbery.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Boeckmann & Maschhoff, 238 Ill.2d 1, 932 N.E.2d 998 (2010)

625 ILCS 5/6-206(a)(43), which requires the suspension of driving privileges for three months where supervision is ordered for the offense of unlawful consumption of alcohol while under the age of 21, satisfies due process.

1. A driver's license is a non-fundamental property interest. A statute which does not impact a

fundamental constitutional right violates due process only if there is no rational relationship between the statute and a legitimate legislative purpose, or if the statute is arbitrary or discriminatory. In applying the rational basis test, a reviewing court must first identify the public interest the statute is intended to protect. The court must then determine whether the statute bears a rational relationship to that interest, and whether the method chosen by the legislature to further that interest is reasonable. Legislation should be upheld against a due process challenge if there is any conceivable basis for a finding that the statute is rationally related to a legitimate State interest.

2. The court identified the public interest protected by §6-206(a)(43) as furthering the safe and legal operation and ownership of motor vehicles. The court concluded that suspending the driving privileges of underage persons who receive court supervision for illegal consumption of alcohol is rationally related to this interest, because the legislature could have concluded that an underage person who consumes alcohol illegally "may take the additional step of driving after consuming alcohol." Furthermore, it is reasonable to believe that underage persons who disobey alcohol consumption laws may also lack the judgment to decline to drive after drinking.

3. Because the legislature could have determined that underage drinkers are likely to drive while unfit to do so, suspending the driving privileges of underage drinkers is a reasonable method of protecting the public interest in promoting the safe and legal operation of motor vehicles.

4. The court rejected the argument that under **People v. Lindner**, 127 Ill.2d 124, 535 N.E.2d 829 (1989), driving privileges may be suspended for the illegal consumption of alcohol only if a motor vehicle was involved in the offense. In **Lindner**, the court found that due process was violated by a statute requiring the suspension of driving privileges upon conviction of certain sex offenses, because there was no rational relationship between the crime and the defendant's use of a motor vehicle or ability to operate a motor vehicle safely. Here, by contrast, the court found a rational relationship in that an underage person who illegally consumes alcohol may be more likely to drive while unfit to safely operate a vehicle.

5. The majority declined to consider whether **People v. Lindner** was wrongly decided and should be overruled. The court noted that the parties had not briefed the issue, and that in any event the result in this case would not be affected if **Lindner** was overruled.

6. The court rejected the defendants' argument that the Secretary of State has discretion whether to suspend a person's driving privileges for underage consumption of alcohol. Because § 6-206(a)(43) provides a specific period of suspension for a person who receives court supervision for underage drinking, the court found that the legislature intended to make revocation mandatory.

7. Finally, the court rejected the argument that the proportionate penalties clause is violated by suspending driving privileges for the underage consumption of alcohol. The proportionate penalties clause applies only to direct action by the government which inflicts punishment on a citizen. Because the legislative purpose of §6-206(a)(43) is to promote the safe and legal operation and ownership of motor vehicles, the statute does not have a punitive purpose. Therefore, the proportionate penalties clause does not apply.

The trial court's order declaring §6-206(a)(43) unconstitutional was reversed, and the cause was remanded for further proceedings.

People v. Burns, 2015 IL 117387 (No. 117387, 12/17/15)

To succeed on a facial challenge, a plaintiff must establish that the law in question is unconstitutional in all applications. When assessing whether a statute meets this standard, a court will consider only scenarios in which the statute actually authorizes or prohibits the conduct at issue. "The proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." **Planned Parenthood of Southeastern Pa. v. Casey,** 505 U.S. 833 (1992).

(Defendant was represented by Assistant Defender Adrienne N. River, Chicago.)

People v. Dabbs, 239 Ill.2d 277, 940 N.E.2d 1088 (2010)

1. 725 ILCS 5/115-7.4 provides that in prosecutions for domestic violence, evidence that the defendant committed other offenses of domestic violence may be admitted on any matter for which it is relevant. In determining whether to admit such evidence, the trial court must weigh the probative value of the evidence against any undue prejudice, considering such factors as the proximity in time between the offenses, the degree of factual similarity between the offenses, and any other relevant facts and circumstances.

The Supreme Court rejected defendant's argument that §115-7.4 violates due process. In the course of its holding, the court noted that the general exclusion of other crimes evidence to show propensity is a common law rule, and not a rule of constitutional magnitude.

Where a statute does not affect a fundamental constitutional right, the rational basis test is used to determine whether substantive due process is violated. Thus, the statute will be upheld so long as it bears a rational relationship to a legitimate State interest and is not arbitrary or unreasonable.

The court concluded that §115-7.4 serves the legitimate State interest of permitting the prosecution of recidivist domestic violence offenders. The court found that domestic violence frequently involves victims who are vulnerable and reluctant to testify, and that a domestic abuser is frequently "adept at presenting himself as a calm and reasonable person and his victim as hysterical or mentally ill." Because the admission of evidence of prior, similar offenses might persuade a trier of fact that the present victim is worthy of belief because her experience is corroborated, §115-7.4 is rationally related to the interest of allowing the effective prosecution of domestic abuse.

2. The court found that the defendant abandoned an equal protection claim which he raised in the petition for leave to appeal but failed to argue in the opening or reply brief or at oral argument.

(Defendant was represented by Assistant Defender Michelle Zalisko, Mt. Vernon.)

People v. Davis, 2014 IL 115595 (No. 115595, 3/20/14)

1. In ***Miller v. Alabama***, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), the United States Supreme Court held that because juveniles "are constitutionally different from adults for purposes of sentencing," it is a violation of the Eighth Amendment's prohibition against cruel and unusual punishments to impose a mandatory sentence of natural life imprisonment on juveniles under 18. A mandatory sentence precludes consideration of mitigating circumstances such as: the juvenile's age; his family and home environment; the circumstances of the offense, including the extent of his participation; his ability to interact with police, prosecutors, and to assist in his defense; the effect of family or peer pressure; and the possibility of rehabilitation. For these reasons, a sentencing court must have the opportunity to consider mitigating circumstances before imposing a sentence of natural life imprisonment on a juvenile.

2. Defendant argued that under ***Miller*** the statutory scheme mandating natural life imprisonment in this case was facially unconstitutional. If a new constitutional rule renders a statute facially unconstitutional, the statute is void ab initio, meaning that the statute was constitutionally infirm and unenforceable from the moment it was enacted. Any sentence imposed under an unconstitutional statute is void and may be attacked at any time. A facial challenge is the hardest to mount since a statute is facially unconstitutional only if there are no set of circumstances in which the statute could be validly applied.

Defendant was sentenced pursuant to section 5-8-1(a)(1)(c) of the Unified Code of Corrections which provides that if a defendant is convicted of murdering more than one individual, the court shall sentence him to natural life imprisonment. Defendant argued that this provision is facially unconstitutional because it never permits a sentencer to consider any of the mitigating factors required by ***Miller***.

The Illinois Supreme Court rejected this argument since ***Miller*** was expressly limited to mandatory life sentences imposed on juveniles. Section 5-8-1(a)(1)(c) by contrast can be validly applied to adults and thus it is not unconstitutional in all of its applications. Additionally, the transfer statute in effect when defendant was tried provided for a permissive transfer that specifically required the court to consider all relevant circumstances attendant to defendant's age, as required by ***Miller*****,** before transferring the juvenile to adult court. Ill. Rev. Stat. 1989, ch. 37,¶805-4. Under these circumstances, the sentencing scheme,

including the transfer statute, was not facially unconstitutional.

People v. Hollins, 2012 IL 112754 (No. 112754, 6/21/12)

The Illinois Supreme Court upheld the conviction of defendant for child pornography against due process and equal protection challenges.

The 32-year-old defendant and his 17-year-old girlfriend were college students who engaged in legal consensual sex. Defendant used his cell phone to take extreme closeup photographs of the couple's genitals. At her request, defendant emailed the photos to his girlfriend. They were discovered when her mother accessed her account. While defendant did not violate any law when he had sexual intercourse with his girlfriend, his recording of that act violated the child pornography statute, which sets 18 as the age at which a person may be legally photographed engaging in sexually explicit conduct. 720 ILCS 5/11-20.1(a)(1).

1. Defendant conceded that his case did not implicate a fundamental right, and therefore the test for determining whether the statute complies with substantive due process is the rational-basis test. A statute will be upheld under this test so long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable.

The court rejected defendant's argument that the application of the child pornography statute to persons old enough to consent to the private sexual activity they have chosen to photograph does not serve the statute's purpose, which is to prevent the sexual abuse and exploitation of children. The State's legitimate interest in protecting the psychological welfare of children is served by having a higher age threshold for appearance in pornography than to consent to sexual activity. The dangers of appearing in pornography are not as readily apparent as the concrete dangers of sexual activity and can be more subtle. Regardless of the intentions of the parties, there is no guarantee that private photographic images will always remain private.

2. The statute does not criminalize wholly innocent conduct. The conduct underlying the recording was legal but the recording was not.

3. Even though the Illinois Constitution provides greater privacy protections than the federal constitution, defendant's claim is not cognizable under the privacy clause of the Illinois Constitution. Ill. Const. 1970, Art. I, §6. Privacy claims in the context of criminal prosecutions have only been recognized where the government or its agents intrude on the privacy of the defendant. The mere fact that the recording of the sex act took place in private, rather than in public, does not implicate the privacy clause.

4. Because the pornography statute is clear and definite, and defendant's ignorance of the statute is no defense, the court rejected defendant's argument that the anomaly between the pornography statute and the sexual assault statute prevented him from having fair notice that his conduct in photographing the legal sex act was criminal.

5. When the legislature raised the age limit of the pornography statute to 18, it did not express any concerns about 17-year-olds not being able to appreciate the subtle dangers of memorializing sexual activity. Its motivation was to aid law enforcement in the prosecution of child pornography. A law will be upheld if there is any conceivable basis for finding a rational relationship to a legitimate legislative purpose, even if that purpose did not in fact motivate the legislative action. Moreover, the desire to aid law enforcement is also rationally related to a legitimate legislative purpose.

6. Defendant's equal protections challenges are rejected for the same reasons as his due process challenges, as those claims are also subject to a rational-basis analysis.

Burke, J., joined by Freeman, J., dissented. The case should be rebriefed to address the effect of the "holding" of **United States v. Stevens**, 559 U.S. , 130 S. Ct. 1577 (2010), that "child pornography, for purposes of the first amendment, exists only if it is 'an integral part of conduct in violation of a valid criminal statute.'"

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Kitch, 239 Ill.2d 452, 942 N.E.2d 1235 (2011)

1. A statute is unconstitutional on its face only if no set of circumstances exist under which it would

be valid.

Section 115-10 of the Code of Criminal Procedure, 725 ILCS 5/115-10 allows admission of a child victim's hearsay statements under two scenarios: (1) the court finds the statement reliable and the child testifies at trial, or (2) the child does not testify, the court finds the statement reliable, and the allegation of sexual abuse is independently corroborated.

The confrontation clause places no restriction on the admission of hearsay testimony under scenario one above since the declarant testifies at trial and is present to defend or explain that testimony. Where the child does not testify under scenario two above, testimonial statements are admissible under **Crawford v. Washington**, 541 U.S. 36 (2004), only if the defendant had a prior opportunity to cross-examine the declarant.

That under both scenarios the statement must also meet the additional reliability requirement set forth in **Ohio v. Roberts**, 448 U.S. 56 (1980), that was repudiated in **Crawford**, is not problematic. This requirement only provides the defendant with additional protection over and above that provided by the confrontation clause. It does not affect the constitutionality of § 115-10 because the hearsay testimony must still satisfy **Crawford**'s constitutional requirements in addition to the statutory requirement of reliability. The evidentiary question of whether hearsay testimony satisfies a statutory exception such as § 115-10 is separate from, and antecedent to, the issue of whether admitting the testimony satisfies the confrontation clause. Therefore, the fact that § 115-10 does not incorporate the limitations on admissibility imposed by **Crawford** does not affect its constitutionality.

2. When construing a statute, a court must give effect to the legislature's intent, considering the subject that the statute addresses, and the legislature's apparent objective in enacting it, and adopting the plain and ordinary meaning of the statutory terms.

By statute, the State's Attorney of a county is entitled to a $50 fee "for each case of appeal taken from his county *** to the Supreme or Appellate Court when prosecuted *** by him." 55 ILCS 5/4-2002(a). This fee applies when the State's Attorney requests that the State's Attorneys Appellate Prosecutor appear. Any case in which the SAAP appears is by necessity prosecuted or defended by a State's Attorney. By statute, SAAP attorneys appear when requested to do so and at the direction of a State's Attorney. 725 ILCS 210/4.01. SAAP attorneys act with the advice and consent of the State's Attorney. Therefore State's Attorneys retain a central role in the appeal even where they utilize SAAP's services, and are entitled to the State's Attorney's fee.

(Defendant was represented by Assistant Deputy Defender Nancy Vincent, Springfield.)

People v. Madrigal, 241 Ill.2d 463, 948 N.E.2d 591 (2011)

The legislature has wide discretion to fashion penalties for criminal offenses, but this discretion is limited by the constitutional guarantee of substantive due process. When a statute that is challenged on substantive due process grounds does not affect a fundamental right, the appropriate test for determining its constitutionality is the highly deferential rational basis test. A statute will be sustained if it bears a reasonable relationship to a public interest to be served, and the means adopted are a reasonable method of accomplishing the desired objective. A statute does not provide a reasonable method of preventing the targeted conduct and fails the rational basis test if it does not contain a culpable mental state and potentially punishes wholly innocent conduct.

The identity theft statute provides that "[a] person commits the offense of identity theft when he or she knowingly . . . uses any personal identification information or personal identification document of another for the purpose of gaining access to any record of the actions taken, communications made or received, or other activities or transactions of that person, without the prior express permission of that person." 720 ILCS 5/16G-15(a)(7). The plain language of this statute and the legislative declaration of 720 ILCS 5/16G-5(b) makes clear that the purpose of this statute is to protect the economy and people of Illinois from the ill effects of identity theft.

Unlike subsections (a)(1) through (a)(5) of the identity theft statute, subsection (a)(7) does not

require that the person act with a criminal purpose in addition to the general knowledge that one is committing the actions specified. It criminalizes the use of mere names, or other commonly and publicly available information such as addresses and phone numbers, for the purpose of gaining access to innocent information without any criminal intent, purpose, or knowledge. Because the statute potentially punishes a significant amount of wholly innocent conduct unrelated to the statute's purpose of addressing the problem of identity theft, it is an invalid use of the police power.

The court declined to read a culpable mental state into the statute. Where a statute already contains a mental state of knowledge, a court cannot read a criminal-purpose requirement into the statute.

People v. Rizzo, 2016 IL 118599 (No. 118599, 6/16/16)

A party raising a constitutional challenge has a heavy burden to rebut the strong presumption that statutes are constitutional. Courts have a duty to uphold the constitutionality of a statute whenever reasonably possible, resolving any doubts in favor of the statute's validity.

Facial and as-applied challenges are not interchangeable. An as-applied challenge requires a showing that the statute violates the constitution as it applies to the facts and circumstances of the challenging party. It is impossible for a court to make an "as-applied" determination of constitutionality without an evidentiary hearing and findings of fact.

In contrast, a facial challenge requires a showing that the statute is unconstitutional under any set of facts. Thus, the specific facts related to the challenging party are irrelevant.

People v. Williams, 235 Ill.2d 178, 920 N.E.2d 446 (2009)

Defendant was convicted of two counts of unlawful use of recorded sounds or images in violation of 720 ILCS 5/16-7(a)(2), and two counts of unlawful use of unidentified sound or audiovisual recordings in violation of 720 ILCS 5/16-8. The former statute prohibits the intentional, knowing or reckless transfer of sounds or images without the consent of the copyright owner, while the latter statute prohibits the intentional, knowing or reckless distribution of recorded material if the packaging fails to contain the actual name and address of the manufacturer and the names of the performers.

1. The court concluded that §16-7(a)(2), which governs the sale of sound or video recordings without the consent of the owner, has been preempted by federal copyright law. Therefore, the convictions under §16-7 were required to be reversed.

A. Whether a state statute is preempted by federal law is a question of congressional intent. Federal law preempts state law in three situations: (1) where Congress explicitly preempts state action; (2) where Congress has enacted a comprehensive regulatory scheme which impliedly preempts the entire field from State regulation; and (3) where State action conflicts with state law. Federal preemption presents a question of law that is subject to *de novo* review.

B. Whether a State law which creates a criminal offense for copyright infringement has been preempted is determined by a two-part test: (1) whether the work in question is fixed is tangible form and comes within copyright law, and (2) whether the elements of a federal cause of action for copyright infringement are equivalent to the elements of the state crime. Because federal law provides that all equivalent legal rights concerning copyrights fixed after February 15, 1972 are to be governed by federal rather than state law, and because §16-7(a)(2) does not contain an additional element that would make it a non-equivalent claim, the court concluded that §16-7(a)(2) has been preempted by the federal law.

The court rejected the State's argument that Congress intended to preempt only State civil contempt laws, and not state criminal laws.

2. The court concluded, however, that defendant's convictions under §16-8, which requires identification of the manufacturer of audio or sound recordings on the external packaging, were proper. First, §16-8 does not violate due process, because it has a rational relationship to the legitimate public interest of protecting consumers from buying pirated recordings.

Second, §16-8 is not unconstitutionally overbroad as a violation of First Amendment rights.

Generally, a person to whom a statute may be constitutionally applied is not permitted to challenge the statute solely on the ground that it may be unconstitutional if applied in other contexts. An exception to this rule is made in First Amendment issues, however, due to the concern that constitutionally protected expression may be deterred by an overbroad statute. Furthermore, conduct which has both speech and "nonspeech" elements may be regulated if the statute furthers a substantial governmental interest that is unrelated to the suppression of free speech, and the incidental restriction of First Amendment concerns is no greater than necessary to further the governmental interest in question.

The court concluded that §16-8 has several factors which significantly narrow its application to the legitimate public interest it is intended to protect. First, the statute requires identification of the manufacturer only if the work is offered in "for profit" transactions. Second, use of a stage or performing name is adequate to comply with the identification requirement of the statute, allowing performers to preserve their anonymity. Under these circumstances, any overbreadth is insignificant in light of the statute's legitimate reach, and any incidental restriction on First Amendment activity is no greater than necessary to further the governmental interest involved.

(Defendant was represented by Assistant Defender Ahmed Kosoko, Chicago.)

In re M.A., 2014 IL App (1st) 132540 (No. 1-13-2540, 5/28/14)

The subsections of the Illinois Murderer and Violent Offender Against Youth Registration Act, 730 ILCS 154/1 *et seq.*, that make the Act automatically applicable to juveniles are facially unconstitutional since they violate procedural due process and equal protection.

1. The Act applies to juveniles who have been adjudicated delinquent for committing or attempting to commit a variety of violent crimes when the victim is under age 18, including aggravated battery and aggravated domestic battery, the offenses at issue here. The registration period lasts for 10 years. The juvenile must register within five days after entry of the sentencing order and must register as an adult within 10 days of turning 17 years old. There is no provision for a juvenile to be taken off the registry.

The Act requires the police to send the registration information to the offender's school district, and to all child care facilities, colleges and libraries in the county. The Act allows the police to disclose the offender's information to "any person likely to encounter a violent offender." Once the juvenile turns 17 and registers as an adult, the registration information is accessible to the public through a statewide database.

The 10-year period is automatically extended for another 10 years when an offender violates any registration requirement. Failure to register is a Class 3 felony and each subsequent violation is a Class 2 felony.

2. Procedural due process claims challenge the procedures used to deny a person life, liberty, or property. The primary components of due process are notice and an opportunity to be heard. In assessing procedural due process claims, courts consider the following factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest; (3) the probable value of additional or substitute procedures; and (4) the State's interest, including the fiscal and administrative burdens of new or additional procedures.

Since the Act affects liberty and privacy interests, but does not entirely deprive a juvenile of those rights, it does not impair any fundamental constitutional rights. Thus, its provisions are analyzed under the rational basis test.

The mandatory requirement that juveniles who commit certain offenses must register as adults under the Act violates procedural due process. The Act automatically requires juvenile offenders to register as adults, with its attendant statewide publication of registration information, without any individualized assessment of their continuing risk to society.

While the initial registration following conviction might not violate due process under the rational basis test, the requirement that juveniles register as adults without any further process does. This is especially true given the transitory nature of youth and the absence of any significant administrative burdens that would be imposed in requiring a hearing to determine whether juveniles remain a danger to society at the time of

adult registration.

3. An equal protection challenge asks whether a statute treats similarly situated individuals in a similar manner. Equal protection does not prohibit the legislature from drawing proper distinctions among different categories of people. Unless fundamental rights are at issue, the classification does not violate equal protection if it bears a rational relationship to the purpose of the statute.

The registration provisions for juvenile violent offenders against youth violate equal protection when compared to the registration procedures for juvenile sex offenders. The two groups are similarly situated because, although they were convicted of different offenses, they both belong to the same class of juvenile offenders who are required to register with the police.

The disparate treatment of the two groups does not bear a rational relationship to the purposes of the Act. The goal of registering both groups is the same: protection of the public. Juvenile sex offenders, however, do not have to register as adults and may petition to be taken off the registry after five years. The same legislative purposes would be served by providing these features to juvenile violent offenders against youth. The failure to do so results in disparate treatment for violent offenders and thus violates equal protection.

4. Although the Act violates procedural due process and equal protection, it does not violate substantive due process. A statute violates substantive due process if it impermissibly restricts a person's life, liberty, or property interests. In the absence of a fundamental right, the statute need only show a rational relationship to the legislative purpose behind its enactment.

In **In re J.W.**, 204 Ill.2d 50 (2003), the Illinois Supreme Court rejected a substantive due process challenge to the registration provisions for juvenile sex offenders, finding a rational relationship between registering juvenile sex offenders and the need to protect the public. The result in **In re J.W.** controls this case. There is a rational relationship between registering juvenile violent offenders against youth and protecting the public. The Act thus does not violate substantive due process.

5. The dissent agreed that the Act did not violate substantive due process, but disagreed with the majority's conclusion that it violated procedural due process and equal protection. The dissent argued that the registration requirements are a collateral consequence of an adjudication of delinquency and juveniles receive due process during their adjudicatory hearings. There is thus no procedural due process violation.

Moreover, juvenile violent offenders against youth are not comparable to juvenile sex offenders, so disparate treatment does not violate equal protection. In providing early termination to sex offenders, the legislature recognized that many sex offenses by juveniles were the result of sexually immature rather than predatory conduct. The legislature has not recognized any similar concern with violent behavior by juveniles. Accordingly, there is a rational basis to treat the two groups differently.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

In re M.I., 2011 IL App (1st) 100865 (No. 1-10-0865, 12/23/11)

1. Whether a statutory command is mandatory or directory is a question of statutory construction. The principal rule of statutory construction is to give effect of the intent of the legislature. Mandatory and directory provisions are both couched in obligatory terms, but differ in that non-compliance with a mandatory provision voids the governmental action in question, while non-compliance with a directory provision does not have the same effect. In determining whether a statute is mandatory or directory, the term "shall" is not determinative.

Statutory language creating a procedural command to a government official is presumed to be directory rather than mandatory. However, this presumption is overcome by negative language prohibiting further action in the event of non-compliance with the statute or where the right intended to be protected by the statute would be injured if the statute was given a directory reading.

2. 705 ILCS 405/5-810(2) provides time limits for a hearing on the State's motion to designate a juvenile proceeding as an extended juvenile jurisdiction proceeding. Under §810(2), the trial court "shall" conduct a hearing within 30 days after the motion is filed, or within 60 days upon a showing of good cause

for the delay.

The Appellate Court concluded that the time limitation was intended to be directory only, noting that the provision neither prohibits the trial court from conducting a hearing on the motion if the specified time frames are not honored nor requires dismissal of the motion if a timely hearing is not held. The court also found that the right in question - the right of the minor respondent to receive a hearing before being subjected to an EJJ proceeding and a stayed adult sentence - is not affected by the mere failure to hold a hearing within the specified time limits. The court acknowledged, however, that the minor could show prejudice from the failure to hold a timely hearing if the delay resulted in a different conclusion than would have been the case had the hearing been timely.

3. The minor, who was adjudicated delinquent under the EJJ statute and given both a juvenile sentence and a stayed adult sentence to be imposed only if he failed to successfully complete the juvenile sentence, lacked standing to challenge the constitutionality of the EJJ statute. The minor claimed that the statute was unconstitutionally vague because it lacked sufficient notice of the conduct which would result in violation of the juvenile sentence and imposition of the stayed adult sentence. The minor also claimed that the statute lacked sufficient guidelines for the trial court to determine whether the juvenile sentence should be revoked.

A party has standing to challenge the constitutionality of a statute only if he has sustained or is in danger of sustaining a direct injury as a result of the statute. Because there had been no allegation that the respondent had violated the juvenile sentence and no reason to believe that the stayed adult sentence would ever be imposed, the court concluded that the challenge was premature. Thus, defendant lacked standing to challenge the constitutionality of the statute until such time as he was required to serve the adult sentence.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

People v. Adams, 404 Ill.App.3d 405, 935 N.E.2d 693 (1st Dist. 2010)

1. A statute comports with substantive due process where it bears a reasonable relationship to a public interest to be served and the means adopted are a reasonable method of accomplishing the desired objective.

The purpose of the armed habitual criminal statute, 720 ILCS 5/24-1.7, is to criminalize recidivist offenders who subsequently receive, possess, sell or transfer firearms and whose prior offenses are of a particular class or nature.

The court concluded that the purpose of the statute to deter and punish such offenders is effectively and reasonably achieved by the statute. The statute does not merely criminalize an offender's character or propensity to commit crimes. The statute requires proof of present conduct before the offender's prior offenses become relevant.

2. The *ex post facto* clause prohibits statutes that increase the punishment for an offense after it is committed. The armed habitual criminal statute does not violate the *ex post facto* prohibition because it punishes the defendant for new and separate crimes committed after the statute was enacted. The prior offenses are merely elements of the offense.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

People v. Aguilar, 408 Ill.App.3d 136, 944 N.E.2d 816 (1st Dist. 2011)

1. Under Illinois law, courts give effect to a clear expression of legislative intent concerning whether a statute is to be applied retroactively. Where there is no clear expression of legislative intent, procedural amendments are generally applied retroactively, while substantive amendments are applied prospectively.

Amendments to the definition of the offense of aggravated unlawful use of a weapon were not intended to apply retroactively to conduct which occurred before the effective date. Because the public act (P.A. 96-742) stated that it would be effective upon becoming a law, the court concluded that it contained an unambiguous statement of legislative intent that the new provisions were to be applied prospectively.

The court acknowledged that where the legislature amends a statute shortly after a controversy

concerning the meaning of the statute, it is presumed that the amendment was intended as a legislative interpretation of the original legislation. However, a subsequent amendment does not replace the plain language of the statute as the best evidence of the legislature's original intent. In addition, the amendment here went further than would have been necessary to correct any possible belief by the legislature that the courts had misinterpreted legislative intent.

2. Generally, constitutional challenges are addressed under the "rational basis" or "strict scrutiny" tests. In **Heller**, the court concluded that the "rational basis" test does not afford a sufficient level of judicial scrutiny where the statute in question regulates a specific, enumerated constitutional right, such as the right to bear arms.

The Appellate Court also found that the "strict scrutiny" standard does not provide an appropriate level of review for Second Amendment issues. The "strict scrutiny" standard examines a statute to determine whether it is narrowly tailored to achieve a compelling governmental interest, and is most commonly used for race-based legislation or classifications or where a statute interferes with a fundamental constitutional right such as freedom of speech.

Noting that the U.S. Supreme Court has not specified a standard of review for Second Amendment issues, the court endorsed the "intermediate scrutiny" standard of review adopted by some jurisdictions when reviewing statutes which impose "less than severe" restrictions on the possession of firearms. Under the "intermediate scrutiny" standard, the court examines whether the law in question serves a significant, substantial, or important governmental interest and if so, whether the "fit" between the regulation and the asserted interest is reasonable.

(Defendant was represented by Assistant Defender David Holland, Chicago.)

People v. Avila-Briones, 2015 IL App (1st) 132221 (No. 1-13-2221, 12/24/15)

The Appellate Court rejected the defendant's request that it revisit whether the statutory scheme created by the Sex Offender Registration Act (730 ILCS 150/1 *et seq.*), the Sex Offender Community Notification Act (730 ILCS 152/101 *et seq.*), and statutes restricting the residency, employment, and presence of sex offenders constitute cruel and unusual punishment under the Eighth Amendment or disproportionate punishment under the Illinois Constitution. The court concluded that even if recent amendments to the statutory scheme constituted "punishment," the restrictions were not disproportionate to legitimate penological goals. In addition, the court concluded that the statutory scheme did not violate substantive or procedural due process.

(Defendant was represented by Assistant Defender Joshua Bernstein, Chicago.)

People v. Campbell, 2013 IL App (4th) 120635 (No. 4-12-0635, 12/24/13)

A statute which is held facially unconstitutional is rendered void *ab initio.* Any convictions which were obtained under the statute are void and must be vacated.

(Defendant was represented by Assistant Defender Janieen Terrance, Springfield.

People v. Davis, 408 Ill.App.3d 747, 947 N.E.2d 813 (1st Dist. 2011)

The unlawful use of a weapon by a felon (UUWF) and the armed habitual criminal statutes impose a burden on conduct falling within the scope of the Second Amendment right to keep and bear arms. Felons are among the people whose rights the constitution protects. Therefore, those statutes must withstand intermediate scrutiny to be upheld. Under this standard, the State must assert a substantial interest to be achieved by restrictions on the constitutional right, and the regulatory technique must be in proportion to that interest.

Both the UUWF and armed habitual criminal statutes serve to protect the public from the danger posed when convicted felons possess firearms. The State has a legitimate interest in protecting the public from the dangers posed by felons in possession of firearms. The armed habitual criminal statute requires that the State prove that the defendant twice committed specific kinds of felonies peculiarly related to the use of

firearms before it can impose the more serious penalties provided by statute. Although neither statute requires a showing of improper purpose for the felon's possession of the firearms, convicted felons present special dangers when they possess firearms.

The Supreme Court in **District of Columbia v. Heller**, 554 U.S. 570 (2008) stated that nothing in that decision "should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons." Although *dicta*, judicial *dicta* should usually carry dispositive weight in an inferior court.

The court upheld both statutes against a constitutional challenge.

(Defendant was represented by Assistant Defender Brian McNeil, Chicago.)

People v. Dawson, 403 Ill.App.3d 499, 934 N.E.2d 598 (1st Dist. 2010)

District of Columbia v. Heller, 554 U.S. ___, 128 S.Ct. 2783, ___ L.Ed.2d ___ (2008), held that the Second Amendment right to bear arms protects the right to possess a handgun in the home for self-defense purposes. In **McDonald v. City of Chicago**, ___ U.S. ___, 130 S.Ct. 3020, ___ L.Ed.2d ___ (2010), the Supreme Court held that the due process clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in **Heller**.

The Appellate Court upheld the constitutionality of the aggravated unlawful use of a weapons statute (720 ILCS 5/24-1.6(a)(1)(3)(A)(2006)) against a Second Amendment challenge in light of **Heller** and **McDonald**. **Heller** and **McDonald** do not define the fundamental right to bear arms to include any activity barred by the statute as it excludes the possession of a firearm in one's own abode from its proscription.

(Defendant was represented by Assistant Defender Jonathan Yeasting, Chicago.)

People v. Dunmore, 2013 IL App (1st) 121170 (No. 1-12-1170, 12/24/13)

A statute which is held facially unconstitutional is rendered void *ab initio.* Any convictions which were obtained under the statute are void and must be vacated.

(Defendant was represented by Assistant Defender Jean Park, Chicago.)

People v. Gray, 2013 IL App (1st) 112572 (No. 1-11-2572, 4/11/13)

A statute that is unconstitutional is not necessarily void. A statute that is unconstitutional on its face – that is, where no set of circumstances exist under which it would be valid – is void *ab initio*. A statute that is merely unconstitutional as applied is not.

Miller v. Alabama, 567 U.S. ___, 132 S. Ct. 2455, ___ L.Ed.2d ___ (2012)January 18, 2017, held that the mandatory imposition of natural-life imprisonment on offenders under age 18 violates the Eighth Amendment. Because **Miller** does not affect the validity of the natural-life-imprisonment statute as to adults, and does not divest a court of the authority to sentence a minor to natural life, a judgment imposing a mandatory natural-life sentence on a minor is merely voidable, not void.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Gray, 2016 IL App (1st) 134012 (No. 1-13-4012, 5/18/16)

1. Defendant was convicted of aggravated domestic battery, which requires the State to prove among other things that the victim was "any family or household member." 720 ILCS 5/12-3.3(a), (a-5). A family or household member includes "persons who have or have had a dating relationship." 725 ILCS 5/112A-3(3). Here defendant and the victim had a dating relationship that had ended 15 years before the offense occurred. The court held that under these facts the aggravated domestic battery statute was unconstitutional as applied.

2. The court first held that it could address this issue even though it was being raised for the first time on appeal. In **Thompson**, 2015 IL 118151, the Illinois Supreme Court held that unlike a facial constitutional challenge to a statute, which may be raised at any time, the defendant could not raise an as-applied constitutional challenge to his sentence for the first time on appeal from the dismissal of his 2-1401 petition. While a facial challenge argues that the statute is unconstitutional under any set of facts, an as-applied challenge argues that the statute is unconstitutional only under the specific facts of the case. Because as-

applied challenges are dependent on specific facts, the record must be sufficiently developed to allow appellate review.

Despite defendant's failure to raise this issue below, the court held that the record here was sufficiently developed to review the claim. At trial, the parties thoroughly explored defendant's relationship with the victim and it was clear that they had not dated for 15 years.

3. Due process prohibits the unreasonable or arbitrary use of police power. If, as in this case, no substantial rights are at issue, courts apply the rational basis test. Under this test, a law will be upheld so long as it bears a reasonable relationship to a public interest and the means adopted are a reasonable way of accomplishing the State's objectives. The legislature's judgment may be based on rational speculation rather than empirical data.

The court held that the State has an interest in preventing abuse between people who share an intimate relationship. And a couple's romantic intimacy may outlive the duration of the dating relationship. But here the record does not suggest that defendant and the victim was still under the effect of romantic intimacy from their relationship 15 years earlier. The State failed to identify any objective that would be furthered by treating the victim here as a family member. Accordingly, the statue was unconstitutional as applied to defendant. His conviction for aggravated domestic battery was reversed.

(Defendant was represented by Assistant Defender Chris Bendik, Chicago.)

People v. Kucharski, 2013 IL App (2d) 120270 (No. 2-12-0270, 3/29/13)

1. 720 ILCS 135/1-2(a)(1) creates the offense of harassment through electronic communications where electronic communications are used to make an "obscene" comment "with an intent to offend." The court rejected the argument that the statute violates the First Amendment because it is a content-based limitation which prohibits only obscene speech which is intended to offend, and not any other obscene speech.

The court found that §1-2(a)(1) is an attempt to regulate conduct which accompanies prohibited speech, and does not seek to regulate speech itself. Although speech may not be constitutionally proscribed because of the ideas it expresses, it may be restricted "because of the manner in which it is communicated or the action it entails." Because §1-2(a)(1) restricts obscene electronic communications due only to the purpose for which the communication is transmitted, and not because of the ideas that are expressed, the statute is constitutional.

2. The court rejected the argument that a communication is "obscene" under §1-2(a)(1) only if it satisfies the definition of "obscenity" established in **Miller v. California**, 413 U.S. 15 (1973) and embodied in the Illinois obscenity statute (720 ILCS 5/11-20(b)). The court concluded that **Miller** and §11-20(b) were intended to provide a definition of "obscene" for purposes of controlling the commercial dissemination of obscenity. Because the legislature did not intend to apply the definition of §11-20(b) to the electronic harassment statute, the court concluded that the ordinary dictionary definition of "obscene" should be employed. Thus, for purposes of the electronic harassment statute, the term "obscene" is defined as "disgusting to the senses" or "abhorrent to morality or virtue."

3. The court rejected the argument that 720 ILCS 135/1-2(a)(2) is unconstitutionally vague and overbroad on its face. Section 1-2(a)(2) creates the offense of harassment through electronic communications for interrupting, "with the intent to harass, . . . the electronic communication service of any person."

A criminal law may be declared unconstitutionally vague because it fails to provide sufficient notice to enable a person of ordinary intelligence to understand what conduct is prohibited, or because it fails to provide sufficient standards to avoid arbitrary enforcement. To prevail on a vagueness challenge to a statute that does not infringe on First Amendment rights, the defendant must establish that the statute is vague as applied to the conduct for which he or she is being prosecuted. A statute that does not impact First Amendment rights will be declared unconstitutionally vague only if it is incapable of any valid application.

The court concluded that the harassment through electronic communication statute prohibits conduct rather than speech, and does not affect First Amendment rights. Therefore, the statute is not unconstitutional

on its face. The court also rejected the argument that the statute is vague because the term "interrupt" is undefined, concluding that when the term is given its ordinary dictionary meaning the statute is sufficient to give adequate notice and prevent arbitrary enforcement.

The court also rejected the argument that the electronic harassment statute violates the First Amendment because it restricts speech that is merely "annoying." The court concluded that to come within the scope of the word "harass," the interruption must be made "with the intent to produce emotional distress or discomfort substantially greater than mere annoyance."

4. 720 ILCS 5/16D-5.5(b)(1) provides that a person "shall not knowingly use or attempt to use encryption" to "commit, facilitate, further, or promote any criminal offense." The term "encryption" is defined as the use of "any protective or disruptive measure, including, without limitation, cryptography, enciphering, encoding, or a computer contaminant," to prevent, impede, delay or disrupt access to data, to make data unintelligible or unusable, or to prevent, impede, delay or disrupt the normal operation or use of a component or device.

The court concluded that §5/16D-5.5(b)(1) is intended to apply only where the defendant engages in "some type of data transformation, manipulation, or destruction." Merely changing the password on another's social media account does not fall within this definition. Thus, defendant's conviction for unlawful use of encryption, which was based on changing his former girlfriend's password to her MySpace account, was reversed.

People v. Lewis, 2016 IL App (4th) 140852 (No. 4-14-0852, 12/20/16)

Defendant was convicted under section 120(a) of the Methamphetamine Control and Community Protection Act (MCCPA) which prohibits a person with a prior conviction under the MCCPA from purchasing or possessing a methamphetamine (meth) precursor (such as pseudoephedrine) without a prescription. Defendant argued that the MCCPA (1) violates due process by punishing wholly innocent conduct and (2) violates due process, equal protection, and the proportionate penalties clause because a violation of the MCCPA is a felony, while a violation of the Methamphetamine Precursor Act (MPA) which involves similar or less culpable conduct is only a misdemeanor. The court rejected these arguments and upheld the constitutional validity of the MCCPA.

1. In deciding whether a statute that does not implicate fundamental rights violates due process (Ill. Const. 1970, art. I, §2; U.S. Const., amend. XIV), the proper inquiry is whether it bears a rational relationship to a legitimate state goal. Such a rational relationship is lacking where a statute punishes wholly innocent conduct. Wholly innocent conduct is conduct unrelated to the legislative purpose and devoid of criminal intent.

The purpose of the MCCPA is to protect the public from the use and distribution of meth. The MCCPA reasonably serves this purpose by regulating the possession of meth precursors by people who have demonstrated a tendency to misuse those substances. Possession of a meth precursor without a prescription by people previously convicted under the MCCPA is not innocent conduct and thus the MCCPA does not violate due process by punishing innocent conduct.

2. A statute may violate the proportionate penalties clause (Ill. Const. 1970, art. I, §11), where it contains a penalty greater that the penalty imposed for an offense with identical elements. Violation of the MCCPA is a Class 4 felony, while violation of the MPA is a Class A misdemeanor. But the MCCPA and the MPA do not have identical elements. The MPA prohibits a person with a prior conviction for any meth-related crime from purchasing or acquiring 7500 milligrams of ephedrine or pseudoephedrine within a 30-day period. 720 ILCS 648/20(b), 40(a)(2)(A). The MCCPA merely requires a prescription to purchase or possess a meth precursor.

The MCCPA also does not violate due process by punishing less culpable conduct more seriously than the MPA. It is within the legislature's purview to determine the seriousness of the crime and it has properly determined that violating the MCCPA involves more serious conduct than violating the MPA. For similar reasons, the MCCPA does not violate equal protection. The existence of different punishments for

different offenses does not offend equal protection.

(Defendant was represented by Assistant Defender Kadi Weck, Chicago.)

People v. McFadden, 2012 IL App (1st) 102939 (No. 1-10-2939, 11/30/12)

When a statute is held unconstitutional in it entirety, it is void *ab initio*. An amendment to a different statute to remedy the constitutional defect does not revive the unconstitutional statute.

People v. Hauschild, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), held that the 15-year firearm sentencing enhancement for armed robbery with a firearm violates the proportionate-penalties clause of the Illinois Constitution because it is more severe than the penalty for the identical offense of armed violence predicated on robbery with a category I or category II weapon. After **Hauschild** was decided, P.A. 95-688 amended the armed violence statute to exclude robbery as a predicate offense to armed violence. A split of authority exists among Appellate Courts whether P.A. 95-688 revived the sentencing enhancement of the armed robbery statute by eliminating the constitutional defect found in **Hauschild**.

The Appellate Court concluded that P.A. 95-688 could not revive the armed robbery enhancement statute. Because **Hauschild** effectively found the enhancement statute void *ab initio*, it could not be revived by an amendment to a different statute, and it is of no consequence that the statute was found unconstitutional prior to the amendment.

Sterba, J., dissented. The 15-year sentencing enhancement to the armed robbery statute was revived by the amendment to the armed violence statute. The legislature amended the statute after the decision in **Hauschild** with the intent to cure the constitutional defect in the armed robbery statute. The chronology of the amendment to the statute being held unconstitutional is legally significant.

(Defendant was represented by Assistant Defender Pamela Rubeo, Chicago.)

People v. Robinson, 2011 IL App (1st) 100078 (No. 1-10-0078, 12/30/11)

1. Generally, constitutional challenges are addressed under either the "rational basis" or "strict scrutiny" test. In determining whether the unlawful use of a weapon by a felon statute (720 ILCS 5/24-1.1(a)) violates the Second Amendment by prohibiting a felon's possession of a weapon in the home, the court utilized the "intermediate scrutiny" standard of review, which requires the court to determine whether the statute in question serves a significant, substantial, or important governmental interest and if so, whether the "fit" between the regulation and the asserted interest is reasonable.

2. In **McDonald v. City of Chicago**, 561 U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) and **District of Columbia v. Heller**, 554 U.S. 570 (2008), the U.S. Supreme Court found that the Second Amendment protects the right to possess weapons within one's home for the purpose of self-defense. In both opinions, however, the court specifically noted that states may prohibit the possession of firearms by felons.

The Appellate Court concluded that the unlawful use of a weapon by a felon statute (720 ILCS 5/24-1.1(a)) is not unconstitutional on its face because it prohibits possession of a weapon by a felon within the felon's home. The court found that the statute constitutes a valid exercise of the government's right to protect the health, safety and general welfare of its citizens, serves a substantial governmental interest, and is proportionate to the interest served.

3. Furthermore, the court rejected the argument that §5/24-1.1(a) is unconstitutional as applied because the State failed to show that defendant's possession of a handgun in his home was for an unlawful purpose. The court concluded that the legislature acted within its broad power to protect citizens by prohibiting the possession of a weapon by persons convicted of felonies, The court concluded that the legislature acted within its broad power to protect citizens by prohibiting any possession of a weapon by persons convicted of felonies, without limiting the prohibition to felons whose possession of weapons is for an unlawful purpose.

(Defendant was represented by Assistant Defender Deborah Nall, Chicago.)

People v Rush, 2014 IL App (1st) 123462 (No. 1-12-3462, 9/30/14)

1. The unlawful use of a weapon by a felon (UUWF) statute makes it unlawful for a convicted felon to possess a firearm. 720 ILCS 5/24-1.1(a). The statute however does not apply to convicted felons who have been granted relief under the Firearm Owners Identification (FOID) Card Act. The FOID Card Act allows any felon, whose conviction is more than 20 years old, to apply to the Director of the Department of State Police or petition the circuit court requesting relief from the prohibitions of the UUWF statute. 430 ILCS 65/10(c)(1).

As a convicted felon, defendant was prohibited from possessing a weapon and was ineligible for relief under the FOID Card Act since his conviction was less than 20 years old. Defendant argued that as applied to him this statutory scheme violated the Second Amendment and his right to due process and equal protection.

2. In deciding whether a statute violates the Second Amendment, courts should first determine whether the challenged law affects conduct within the scope of the Second Amendment. If the challenged law only applies to conduct outside the scope of the Second Amendment, then the regulated conduct is categorically unprotected. On the other hand, if a court finds that the law does apply to conduct within the scope of the Second Amendment, the court must then determine what level of constitutional scrutiny to apply.

The Appellate Court first held that banning the possession of firearms by felons does not impose a burden on conduct within the scope of the Second Amendment. The court relied on the language of **People v. Aguilar**, 2013 IL 112116, where the Illinois Supreme Court specifically found that the right to bear arms is subject to certain restrictions, and reaffirmed the validity of longstanding prohibitions on the possession of weapons by a felon. Restricting the right of convicted felons to possess guns thus does not implicate the Second Amendment.

Even if it did, however, the statute would not be unconstitutional since the appropriate level of scrutiny would be rational basis, not strict or intermediate scrutiny. And under a rational basis test, the UUWF statute bears a rational relationship to the State's legitimate interest in protecting the health, safety, and general welfare of its citizens from the danger posed by convicted felons being in possession of weapons.

3. The statute as applied also does not violate defendant's right to due process and equal protection. The court rejected defendant's argument that the statutory process to obtain a FOID card is arbitrary because it grants some felons the right but denies it to others. The State's 20-year waiting period is a legitimate exercise of its interest in placing restrictions on the possession of weapons by felons, and there is nothing arbitrary about it.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Todd McHenry, Chicago.)

People v. Schmidt, 405 Ill.App.3d 474, 938 N.E.2d 559 (3d Dist. 2010)

720 ILCS 646/35, which prohibits a person from knowingly using or allowing the use of a vehicle, structure, real property or personal property within his control to commit a methamphetamine violation, does not violate due process. Furthermore, §35 is not unconstitutionally overbroad or vague.

Legislation which does not affect a fundamental constitutional right satisfies due process if: (1) it bears a reasonable relationship to the public interest intended to be served by the statute, and (2) the means adopted are reasonable to accomplish the desired objective. Because defendant was charged with using his personal vehicle to commit a methamphetamine violation, the court found that it need not consider other scenarios which might have presented issues concerning the constitutionality of §35. The court also held that the statute bears a rational relationship to the interest of safeguarding the public from the harm caused by manufacturing and distributing methamphetamine. Furthermore, the statute adopts a reasonable method of protecting the public by prohibiting the use of a vehicle to manufacture or possess methamphetamine.

The court rejected the argument that the statute is void for vagueness, finding that it is sufficiently clear to provide fair notice to a person with ordinary intelligence that using a vehicle to commit a methamphetamine crime constitutes the offense of unlawful use of property. In addition, the statute is not

subject to arbitrary or discriminatory enforcement.

Finally, the court rejected the argument that §35 is overbroad because it is impossible to violate the Methamphetamine Control and Community Protection Act without also committing unlawful use of property. Under U.S. Supreme Court precedent, an overbreadth argument rarely will succeed where the law in question does not specifically address speech or conduct necessarily associated with speech (such as picketing or demonstrating). (See **Virginia v. Hicks**, 539 U.S. 113 (2003)).

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

People v. Solis, 2013 IL App (1st) 102756 (No. 1-10-2756, 3/12/13)

The prostitution statute proscribes performing, offering, or agreeing to perform any act of sexual penetration for anything of value. 720 ILCS 5/11-14(a). The Appellate Court rejected the defendant's argument that the prostitution statute is unconstitutional because it combines both inchoate and completed forms of the offense.

Offering or agreeing to perform a sexual act is not the inchoate offense of attempted prostitution. An agreement or an offer to perform an act of sexual penetration for anything of value constitutes the completed offense of prostitution. The legislature has determined that the offer or the agreement to perform a sexual act is as serious a social problem as the act itself.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

People v. Taylor, 2012 IL App (1st) 110166 (No. 1-11-0166, 12/18/13)

In **People v. Aguilar**, 2013 IL 112116, the Illinois Supreme Court held that the aggravated UUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3)(A)) violated the Second Amendment because it was a flat ban on carrying guns outside the home. But the court also held that the right to possess and use a firearm was not unlimited and is subject to meaningful regulations.

A different subsection of the statute prohibits the possession of firearms by persons who do not obtain a FOID card. 720 ILCS 5/24-1.6(a)(1), (a)(3)(C). This subsection is not a comprehensive ban on possession and carrying firearms. It only affects those who do not possess a FOID card.

Courts have not applied a consistent level of scrutiny to determine whether a restriction placed on the right to keep and bear a firearm is reasonable. The appellate court concluded that it need not determine which approach is correct, as the FOID card restriction is constitutional under any approach.

Under the strict scrutiny approach, the means employed by the legislature must be necessary to achieve a compelling state interest, and the statute must be narrowly tailored to accomplish this goal. The FOID card requirement seeks to protect the public from individuals carrying firearms who should not be permitted to do so. Requiring compliance with the FOID card requirement is the least restrictive way to meet this compelling state interest.

Under the "text, history, and tradition" approach, the court assesses whether a firearm law regulates activity falling outside the scope of the Second Amendment right as it was understood at the time of the amendment's adoption. A state law restricting an individual's Second Amendment right to bear arms may prevail when guns are forbidden to a class of persons who present a higher than average risk of misusing a gun. The FOID card requirement is such a law. It is the state's method to prevent those who present a higher than average risk of misusing a gun (such as minors, felons, or the mentally ill) from legally carrying one in public places.

Therefore the FOID card requirement is not facially unconstitutional.

(Defendant was represented by Assistant Defender Karl Mundt, Chicago.)

Top

§48-3(b)
Vague - Overbroad

Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) A criminal statute violates due process if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden, or if it is so indefinite that it encourages arbitrary arrests and convictions. See also**, Grayned v. Rockford**, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) (discussion of the important values offended by vague statutes).

Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) City ordinance prohibiting three or more persons from assembling on sidewalks and conducting themselves in a manner annoying to persons passing by is unconstitutionally vague; ordinance subjects the right of assembly to an unascertainable standard and improperly punishes protected conduct. See also, **City of Chicago v. Morales**, 177 Ill.2d 440, 687 N.E.2d 53 (1997) (Chicago's "Gang Congregation Ordinance" held to be unconstitutionally vague and an arbitrary restriction on personal liberties).

Kolender v. Lawson, 461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) State statute which required persons stopped by police on "reasonable suspicion" to provide "credible and reliable" identification was unconstitutionally vague. It failed to describe with sufficient particularity what a suspect must do to satisfy the statute, thereby vesting "virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in absence of probable cause to arrest."

Papachristou v. Jacksonville, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) Vagrancy ordinance held unconstitutional for vagueness.

Palmer v. Euclid, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971) City "suspicious person" ordinance is unconstitutional as vague and lacking in ascertainable standards of guilt to give fair notice of forbidden conduct.

Wainwright v. Stone, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973) State's felony sodomy statute, which uses "abominable and detestable crime against nature" language, is not unconstitutionally vague. Federal courts must determine vagueness in light of prior State constructions of the statute.

Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968) State statute making it a crime to picket in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any courthouse or other public building is not so broad, vague or indefinite as to be unconstitutional.

Grayned v. Rockford, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972) A statute which is clear and precise may be overbroad if it prohibits constitutionally protected conduct.

People v. Taylor, 138 Ill.2d 204, 561 N.E.2d 667 (1990) Provision in the Wildlife Code which makes it a criminal offense to be "engaging in the business of taxidermy" without a license was upheld. The term "taxidermy" and the phrase "engaging in the business of taxidermy" are not unconstitutionally vague.

> "[A] person should not be subjected to a penalty for certain conduct unless the words of the statute clearly describe the conduct prohibited. The requirement that laws not be vague furthers three important policies. First, laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may fashion his conduct accordingly. Second, laws must provide explicit standards to prevent their arbitrary or discriminatory application by policemen, judges and juries.

> Finally, where first amendment freedoms of expression are involved, a statute should not be so vague that it chills the free exercise of those protected rights by creating fear that such conduct may fall within the statute's proscription."

A criminal statute need not contain definitions for each element of an offense. Rather, it is sufficient for a statute to "convey a sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

People v. Dednam, 55 Ill.2d 565, 304 N.E.2d 627 (1973) Due process is violated where a criminal statute fails to give adequate notice as to what action or conduct will subject one to criminal penalties. A statute is unconstitutional where it is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability. The test is whether language conveys sufficiently definite warnings as to proscribed conduct when measured by common understanding and practices.

People v. Schwartz, 64 Ill.2d 275, 356 N.E.2d 8 (1976) A criminal statute violates due process if it fails to adequately give notice of the action or conduct that is proscribed. Impossible standards of specificity are not required.

A statute that is sufficient to withstand a vagueness attack may be impermissibly overbroad if it might reasonably be interpreted to prohibit conduct that is constitutionally protected.

People v. Pembrock, 62 Ill.2d 317, 342 N.E.2d 28 (1976) A statute is unconstitutionally vague if its terms are so ill defined that the ultimate decision as to its meaning rests upon the opinions and whims of the trier of fact, rather than upon any objective criteria or facts.

People v. Einoder, 209 Ill.2d 443, 808 N.E.2d 517 (2004) A statute may be unconstitutionally vague either on its face or as applied to defendant's actions. Unless a statute implicates First Amendment protections, it may not be challenged on its face except where it is incapable of any valid application.

The trial court erred by finding that 415 ILCS 5/44(b)(1)(A), which creates the offense of criminal disposal of waste, was unconstitutionally vague on its face because the legislature did not sufficiently define certain terms. Because the statute does not affect First Amendment rights and defendants did not allege that it was incapable of any valid application, a facial challenge could not be raised.

A statute which does not involve First Amendment rights satisfies due process if it gives fair notice of the prohibited conduct and provides sufficiently definite standards to avoid arbitrary and capricious enforcement. Because the parties failed to present evidence whether the disputed statutory sections are vague as applied to defendant's alleged conduct, and the trial court did not rule on the validity of the statute as applied, the cause was remanded for an evidentiary hearing.

People v. Greco, 204 Ill.2d 400, 790 N.E.2d 846 (2003) 625 ILCS 5/4-103.2(b), which permits the trier of fact to infer that a person who exercises exclusive, unexplained possession over a stolen vehicle has knowledge that the vehicle is stolen, without regard to whether the theft was recent or remote, violates due process as applied to "special mobile equipment."

In re Lakisha M., 227 Ill.2d 259, 882 N.E.2d 570 (2008) 730 ILCS 5/5-4-3, which requires that juveniles who are found guilty of or given supervision for felony conduct are required to submit DNA samples for use in the state DNA database, is constitutional as applied to delinquent minors. The DNA collection statute is not overbroad. The overbreadth doctrine applies only to First Amendment constitutional challenges, not to Fourth Amendment challenges.

People v. Carpenter, 228 Ill.2d 250, 888 N.E.2d 105 (2008) 625 ILCS 5/12-612, which makes it unlawful

to own or operate a motor vehicle which is known to contain "a false or secret compartment," violates due process.

People v. Law, 202 Ill.2d 578, 782 N.E.2d 247 (2002) 235 ILCS 5/6-16(c), which created a Class A misdemeanor where a resident: (1) knowingly permitted a gathering at his or her residence, and (2) a person under the age of 21 illegally consumed alcohol and was permitted to leave in an intoxicated condition, was unconstitutionally vague on its face.

A statute which imposes an affirmative duty upon an individual to take action is unconstitutionally vague if it fails to give fair warning of the conduct required.

Section 6-16(c) fails to provide adequate notice of the steps to be taken to prevent an intoxicated minor from leaving a gathering. For example, the resident is not informed whether calling police or the minor's parents complies with the statute, or whether the minor must be forcibly detained.

Furthermore, a resident who physically detains an intoxicated minor could be charged with unlawful restraint, a Class 4 felony. If §6-16(c) is to be read as authorizing the commission of a criminal offense, the legislature must provide more explicit guidance.

Section 6-16(c) is unconstitutionally vague on its face, and not merely as applied, because the complete failure to define the actions required to comply with the statute forces "any person of common intelligence to speculate" as to its meaning, and precludes any set of circumstances in which the statute is not impermissibly vague.

People v. Izzo, 195 Ill.2d 109, 745 N.E.2d 548 (2001) 720 ILCS 5/21-6, which prohibits possessing or storing specified weapons "in any building or on land supported in whole or in part with public funds . . . without prior written permission from the chief security officer for such land or building," is not unconstitutionally vague for failing to define the phrase "chief security officer." Because there are circumstances in which citizens would be able to identify the "chief security officer" of a public building, §21-6 is not unconstitutional on its face and must be considered within the factual context of the instant case.

Although none of the administrators or employees at defendant's school bore the specific title "chief security officer," a person of ordinary intelligence would understand that permission should be sought from "whoever had responsibility for overseeing security issues at the school." Furthermore, someone who was truly confused as to the identity of the chief security officer "could simply have gone into the school office and asked."

People v. Maness, 191 Ill.2d 478, 732 N.E.2d 545 (2000) 720 ILCS 150/5.1, which creates the offense of sexual abuse of a child where a parent or step-parent "knowingly allows or permits an act of criminal sexual abuse or criminal sexual assault . . . upon his or her child and fails to take reasonable steps to prevent its commission or future occurrences of such acts," is unconstitutionally vague. To satisfy constitutional concerns, a criminal statute must: (1) provide a person of ordinary intelligence a reasonable opportunity to distinguish between lawful and unlawful conduct, and (2) define the offense adequately to prevent arbitrary and discriminatory enforcement. Section 5.1 fails to satisfy either requirement. The statute does not specify what "reasonable steps" a parent must take in order to comply. In addition, §5.1 risks arbitrary and discriminatory enforcement; just as the statute does not set forth what "reasonable steps" a parent must take to avoid a criminal offense, it provides no guidelines for authorities to determine whether the statute has been violated.

People v. Falbe, 189 Ill.2d 635, 727 N.E.2d 200 (2000) 720 ILCS 570/401(c)(2), which enhances possession of cocaine with intent to deliver to a Class X felony where the offense occurs on a public way within 1,000 feet of a church, is not void for vagueness. The statute was reasonably designed to prohibit the presence of drug traffickers, and thus decrease the number of drug offenses, in areas where inhabitants are particularly vulnerable to criminal activity and "less able" to protect themselves. The legislature acted rationally by

prohibiting all possession and manufacturing within the protected area, because "it follows logically that the presence of drug traffickers and quantities of drugs in these areas is likely to result in an increase of drug transactions with all their attendant evils."

People v. Conlan, 189 Ill.2d 286, 725 N.E.2d 1237 (2000) 625 ILCS 5/15-111, which regulates weights and loads of vehicles operating on Illinois highways, is not unconstitutionally vague because of its volume, number of exceptions, and frequent use of the phrase "provided that." The issue is "whether the statute is comprehensible such that it provides fair notice of what is prohibited." A person of ordinary intelligence would understand that the statute regulates weights and loads on Illinois highways, and the terminology chosen by the legislature is not so inconsistent or lacking in definition as to deny clear understanding.

People v. Heinrich, 104 Ill.2d 137, 470 N.E.2d 966 (1984) Criminal defamation statute upheld. The statute is not overly broad; it "applies only to those words which by their very utterance tend to incite an immediate breach of the peace." Further, "the guarantees of the first and fourteenth amendments have never required that truth be an absolute defense in a prosecution for criminal defamation of a private person."

People v. Bossie, 108 Ill.2d 236, 483 N.E.2d 1269 (1985) Public Demonstrations Law is unconstitutional because the phrase "principal law enforcement officer" is so vague that "men of common intelligence must necessarily guess at its meaning." Because the term "principal law enforcement officer" is used throughout the substantive provisions of the statute, "the entire statute is contaminated by unconstitutional vagueness."

People v. Carter, 97 Ill.2d 133, 454 N.E.2d 189 (1982) Franchise Disclosure Act, which permits the Attorney General to grant exemptions to the Act "if he finds that the enforcement of this Act is not necessary in the public interest," upheld. The phrase "in the public interest" is not an improper standard for delegation, but is an "intelligible standard which survives constitutional scrutiny." Conviction affirmed.

People v. Wisslead, 108 Ill.2d 389, 484 N.E.2d 1081 (1985) The unlawful restraint statute is not vague or overbroad. The language in the statute (i.e., "detain" and "legal authority") does not "render it impossible for an ordinary citizen to discern what conduct is prohibited."

People v. Bailey, 167 Ill.2d 210, 657 N.E.2d 953 (1995) Stalking and aggravated stalking statutes (720 ILCS 5/12-7.3 & 5/12-7.4) as they existed in 1992 were upheld. The stalking statute was not unconstitutionally overbroad because it failed to provide that defendant's actions must be "without lawful authority." The legislature intended that the statutes apply only to conduct performed without lawful authority. Thus, the missing phrase is implied, and innocent conduct cannot be prosecuted.

The stalking statute was not facially overbroad because it could apply to speech protected by the First Amendment. The legislature intended to prohibit only conduct which is not constitutionally protected, and the First Amendment does not protect the act of making a threat.

Finally, the stalking statute is not unconstitutionally vague because it fails to define the term "follows" or the phrase "in furtherance of." Both terms have commonly-understood meanings which provide adequate notice of the prohibited conduct and prevent arbitrary enforcement.

People v. Hickman, 163 Ill.2d 250, 644 N.E.2d 1147 (1994) 720 ILCS 570/405.1(c), which provides that a person convicted of criminal drug conspiracy "may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy," is not unconstitutionally vague because it fails to provide a minimum sentence. Due process requires only that citizens have fair notice of sentencing provisions, and not that every crime necessarily include a minimum sentence.

People v. Wawczak, 109 Ill.2d 244, 486 N.E.2d 911 (1985) Defendant was charged with a violation of Ch.

95½, ¶11-1003.1, which states:

> "Notwithstanding other provisions of this Code or the provisions of any local ordinance, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian, or any person operating a bicycle or other device propelled by human power and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any obviously confused, incapacitated or intoxicated person."

The statute was not vague.

> "When the statute here in question is read with reference to the judicial definition of 'due care' it is clear that the statute is not impermissibly vague. The statute makes it clear that drivers must attempt to avoid colliding with bicyclists and pedestrians, employing that degree of care which a reasonable person would have in the same situation. The fact that judges and juries might differ to some degree as to what care a reasonable person might employ does not make the standard a subjective one. A statute is not vague merely because it requires the trier of fact to determine a question of reasonableness."

People v. Raby, 40 Ill.2d 392, 240 N.E.2d 595 (1968) The disorderly conduct statute is not vague or overbroad.

People v. Klick, 66 Ill.2d 269, 362 N.E.2d 329 (1977) Disorderly conduct statute prohibiting a person from making a telephone call with the intent to annoy is unconstitutionally overbroad. The statute is not limited to unreasonable conduct, but applies to conduct protected under the First Amendment. Compare, **People v. Parkins**, 77 Ill.2d 253, 396 N.E.2d 22 (1979) (harassment by telephone statute upheld; unlike the statute at issue in **Klick**, this statute requires intent to abuse, threaten or harass).

People v. Jihan, 127 Ill.2d 379, 537 N.E.2d 751 (1989) The provisions of the Illinois Medical Practice Act which prohibit the unlicensed practice of "midwifery" are unconstitutionally vague; statutes do not provide sufficient notice of the conduct prohibited.

People v. Anderson, 148 Ill.2d 15, 591 N.E.2d 461 (1992) Defendants, students at Western Illinois University, were charged under the hazing statute, which provides:

> "Whoever shall engage in the practice of hazing in this state, whereby any one sustains an injury to his person therefrom, shall be guilty of a Class B misdemeanor. . . . The term "hazing" in this act shall be construed to mean any pastime or amusement, engaged in by students or other people in schools, academies, colleges, universities, or other educational institutions of this state, or by people connected with any of the public institutions of this state, whereby such pastime or amusement is had for the purpose of holding up any student, scholar or individual to ridicule for the pastime of others."

The information alleged that during an initiation ceremony for new members of the lacrosse club, an initiate died of alcohol poisoning.

The hazing statute was not overbroad because it could potentially be applied to speech protected by the First Amendment. Because the statute applies only to conduct which recklessly, knowingly or intentionally results in physical injury, it is not likely to be applied to protected speech.

Statute was not unconstitutionally vague for failing to give fair warning of the conduct which is

prohibited or for containing insufficient guidelines to prevent arbitrary enforcement. Even if there are hypothetical situations in which the statute might fail to give fair warning, it clearly applies to college students participating in initiation activities. There is also no chance that the statute will be arbitrarily enforced; even if a broad interpretation is given to the element that one must hold a person up "to ridicule for the pastime of others," the requirement of a physical injury narrows the range of cases to which the statute could apply.

People v. Fabing, 143 Ill.2d 48, 570 N.E.2d 329 (1991) Defendant was convicted of four counts of unlawful possession of a dangerous animal for possessing an alligator, a boa constrictor, and two pythons. The statute defines a "dangerous animal" as "any poisonous or life-threatening reptile." Defendant argued that the statute was unconstitutionally vague because there is no definition of the term "life-threatening."

The statute is not vague on its face. The term "life-threatening" is commonly understood to mean "that which might possibly attack humans, and which is reasonably capable of killing humans in the event of such an attack."

The statute is not unconstitutionally vague as applied to the pythons and alligator. Expert testimony showed that it is reasonably possible that the animals would attack humans, and they are reasonably capable of killing a human.

However, the statute was unconstitutionally vague as applied to possession of the boa constrictor, because experts disagreed about whether a seven-foot boa can be considered life-threatening. In light of the conflict in expert opinion, a person of common intelligence would be required to guess as to whether the statute applies.

People v. Zaremba, 158 Ill.2d 36, 630 N.E.2d 797 (1994) 720 ILCS 5/16-1(a)(5) (theft of property represented by a law enforcement officer to have been stolen) violates due process. Because the statute does not require that defendant act with a culpable mental state, it can be applied to wholly innocent conduct.

People v. Russell, 158 Ill.2d 22, 630 N.E.2d 794 (1994) 720 ILCS 5/12-16.2(a)(1), which provides that a carrier of the HIV virus commits a Class 2 felony by knowingly transmitting the virus through intimate contact, neither violates the First Amendment right to free speech and association nor is unconstitutionally vague. The statute has no connection to free speech, the right to free association could not apply to these cases (in which the victim was unaware of defendant's HIV-positive status and the intimate contact was achieved through force), and the statute is sufficiently clear that a person of ordinary intelligence need not guess at its meaning.

People v. Blackwood, 131 Ill.App.3d 1018, 476 N.E.2d 742 (3d Dist. 1985) Criminal provisions of the Domestic Violence Act upheld. The statutory language is not so vague and overbroad that it chills certain constitutional rights.

People v. Simpson, 268 Ill.App.3d 305, 643 N.E.2d 1262 (1st Dist. 1994) The financial exploitation of a disabled person statute (720 ILCS 5/16-1.3(a)) is not unconstitutionally vague. First, because knowledge of the victim's medical condition is immaterial to whether an offense is committed, the statute does not fail to give adequate notice of the type of conduct that is prohibited.

Furthermore, because the statute does not involve First Amendment rights, defendant could challenge its constitutionality only as it related to his own acts. Whatever notice problems might exist under other circumstances, defendant was clearly aware of the complainant's condition since he knew she had a disability requiring the use of a wheelchair and that her income consisted solely of disability checks, and because he had been her financial advisor for more than five years.

People v. Braddock, 348 Ill.App.3d 115, 809 N.E.2d 712 (1st Dist. 2004) 720 ILCS 5/11-14.1(a), which

creates the offense of solicitation of sex acts, is not overbroad; it does not violate the First Amendment right to communicate. Generally, speech which is an integral part of unlawful conduct has no constitutional protection. Because the legislature has determined that offering money or items of value in exchange for sexual acts is unlawful, soliciting sexual acts in return for money is not protected by the First Amendment.

People v. Irvine, 379 Ill.App.3d 116, 882 N.E.2d 1124 (1st Dist. 2008) 720 ILCS 5/12-3.2 defines domestic battery as intentionally or knowingly causing bodily harm "to any family or household member," or making physical conduct of an insulting and provoking nature with a "family or household member." 725 ILCS 5/112A-3(3) defines the term "family or household member" as including "persons who have or have had a dating or engagement relationship."

Defendant and the complainant qualified as family members because they had dated for six weeks and continued to have sexual intercourse up until the date of the offense.

Section 12-3.2 is not unconstitutionally vague for failing to offer sufficient guidance as to what constitutes a "dating relationship" sufficient to fall within the purview of the domestic battery statute.

Defendant's vagueness argument previously was rejected by **People v. Wilson**, 214 Ill.2d 394, 827 N.E.2d 416 (2005), which found that the language of the domestic violence statute and definition of "family members" are sufficiently explicit to guide those who must comply with them. Therefore, the statutes are not unconstitutionally vague.

People v. Stork, 305 Ill.App.3d 714, 713 N.E.2d 187 (2d Dist. 1999) 720 ILCS 5/11-9.3, which prohibits a child sex offender from knowingly being present on school property or loitering on a public way within 500 feet of school property while persons under the age of 18 are present, unless the offender is the parent or guardian of a student on school property or has permission to be present, is not unconstitutionally vague.

People v. Selby, 298 Ill.App.3d 605, 698 N.E.2d 1102 (4th Dist. 1998) 720 ILCS 5/33-3(b)(c), which defines the offense of official misconduct, is not unconstitutionally vague as applied to correctional officers who allegedly engaged in intercourse with DOC inmates in violation of DOC rules prohibiting "socializing" between inmates and officers. Even if consensual sexual relations are protected by the First Amendment and defendants could therefore challenge such rules on their face, the ordinary and popularly understood meaning of the terms "socializing" and "socialize" place DOC employees on notice that they may not develop and engage in "close personal relations with prison inmates" except to the extent necessary to perform job-related functions and where the relationship is approved by the DOC director.

People v. DePalma, 256 Ill.App.3d 206, 627 N.E.2d 1236 (2d Dist. 1994) 625 ILCS 5/4-103(a)(4) & (b), which prohibit the knowing possession of a vehicle on which the Vehicle Identification Number has been removed or altered, violates due process because it does not require that defendant act with a culpable mental state. Therefore, under **People v. Tolliver**, 147 Ill.2d 397, 589 N.E.2d 527 (1992), and **People v. Gean**, 143 Ill.2d 281, 573 N.E.2d 818 (1991), the statute should be read as requiring that defendant act with "criminal knowledge."

People v. Nelson, 336 Ill.App.3d 517, 784 N.E.2d 379 (3d Dist. 2003) 720 ILCS 5/16-1(a)(4)(A), which prohibits a person from knowingly obtaining control over stolen property "under such circumstances as would reasonably induce him to believe that the property was stolen" and with the intent to permanently deprive the owner of the use or benefit of the property, is not unconstitutionally vague.

Here, defendant bought electronic items worth at least $1,250 for $380, the purchase was made on the street at 4 a.m., and the seller refused to provide a receipt. A person of ordinary intelligence presented with the opportunity to purchase items under these circumstances would have reason to believe that the merchandise had been stolen.

People v. Jamesson, 329 Ill.App.3d 446, 768 N.E.2d 817 (2d Dist. 2002) 720 ILCS 5/25-1.1, which creates the offense of unlawful contact with street gang members and defines the offense as knowingly having direct or indirect contact with a street gang member after having been sentenced to supervision, probation, or conditional discharge with a condition to refrain from such contact, is neither overbroad nor unconstitutionally vague. The statute is sufficiently definite to inform a person of ordinary intelligence of the prohibited conduct and prevent arbitrary and inconsistent enforcement.

People v. Townsend, 275 Ill.App.3d 413, 654 N.E.2d 1096 (2d Dist. 1995) 720 ILCS 5/24-1.2(a)(2), which creates a Class 1 felony for knowingly or intentionally discharging a firearm "in the direction" of another person or an occupied vehicle, was upheld against vagueness and due process challenges. Defendant lacked standing to raise the vagueness issue because, whether or not the statute might be vague under other circumstances, it clearly prohibited defendant's act of senselessly firing a handgun directly at another person.

Also, there was a rational basis for the legislature to conclude that the act of discharging a firearm is a sufficiently serious offense to justify classification as a Class 1 felony, though aggravated assault is only a Class 4 felony. The elements of the two offenses are not identical, and aggravated discharge of a firearm is not a less serious offense than aggravated assault.

People v. Parker, 277 Ill.App.3d 585, 660 N.E.2d 1296 (4th Dist. 1996) 720 ILCS 570/406.1, (permitting unlawful use of a building), is not unconstitutional. Statute provides that a person commits the offense of permitting unlawful use of a building where he or she knowingly "grants, permits, or makes the building available for use" in unlawfully manufacturing or delivering a controlled substance.

The statute is not vague because it fails to define the term "controlled" or the phrase "grants, permits or makes the building available for use." Furthermore, because the statute requires defendant's actions to be performed "knowingly," it could not be applied to persons who do not have criminal intent.

People v. Perea, 347 Ill.App.3d 26, 807 N.E.2d 26 (1st Dist. 2004) 705 ILCS 405/5-805(2)(a), which upon a finding of probable cause authorizes adult prosecution of a minor who is at least 15 and who is charged with a Class X felony, requires adult sentencing if the minor is acquitted of the offense which led to his transfer but convicted of a different Class X felony. Thus, the trial court lacks authority to order juvenile sentencing of such minors.

Due process and equal protection are not violated by the presumptive transfer statute on the basis that persons presumptively transferred to adult court are treated more harshly than juveniles transferred under the automatic transfer statute (705 ILCS 405/5-130(2)) or the extended juvenile jurisdiction statute (705 ILCS 405/5-810)). The presumptive transfer statute is not unconstitutionally vague because it fails to provide sufficient notice that adult sentencing may be required even if the minor is acquitted of the predicate felony for which the transfer was ordered.

Cumulative Digest Case Summaries **§48-3(b)**

People v. Clark, 2014 IL 115776 (No. 115776, 3/20/14)

1. Generally, a party bringing a facial challenge to the constitutionality of a statute must show that there are no circumstances under which the statute would be valid. However, a statute which affects the First Amendment may be invalid as overbroad if, judged in relation to the statute's plainly legitimate sweep, a substantial number of its applications are unconstitutional. This expansive remedy is justified by the fear that the threat of enforcement of an overbroad law may deter or chill constitutionally protected speech, especially when the statute imposes criminal sanctions.

2. A "content-neutral" statute regulates speech without discrimination concerning the messenger or

the content of the message. A content-neutral regulation satisfies First Amendment concerns if it advances important governmental interests that are unrelated to the suppression of free speech and does not substantially burden more speech than is necessary to further those interests.

3. The court concluded that the eavesdropping statute (720 ILCS 5/14–2(a)(1)(A)) advances the important governmental interest of protecting individuals from the surreptitious monitoring of their private conversations by the use of eavesdropping devices, but criminalizes an entire range of wholly innocent conduct because it prohibits the recording of any conversation absent consent from all parties even where it is clear that the parties had no expectation of privacy. Because §14–2(a)(1)(A) substantially burdens more speech than is necessary to serve the legitimate interests of the statute, the statute is unconstitutionally overbroad.

People v. Hollins, 2012 IL 112754 (No. 112754, 6/21/12)

The Illinois Supreme Court upheld the conviction of defendant for child pornography against due process and equal protection challenges.

The 32-year-old defendant and his 17-year-old girlfriend were college students who engaged in legal consensual sex. Defendant used his cell phone to take extreme closeup photographs of the couple's genitals. At her request, defendant emailed the photos to his girlfriend. They were discovered when her mother accessed her account. While defendant did not violate any law when he had sexual intercourse with his girlfriend, his recording of that act violated the child pornography statute, which sets 18 as the age at which a person may be legally photographed engaging in sexually explicit conduct. 720 ILCS 5/11-20.1(a)(1).

1. Defendant conceded that his case did not implicate a fundamental right, and therefore the test for determining whether the statute complies with substantive due process is the rational-basis test. A statute will be upheld under this test so long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable.

The court rejected defendant's argument that the application of the child pornography statute to persons old enough to consent to the private sexual activity they have chosen to photograph does not serve the statute's purpose, which is to prevent the sexual abuse and exploitation of children. The State's legitimate interest in protecting the psychological welfare of children is served by having a higher age threshold for appearance in pornography than to consent to sexual activity. The dangers of appearing in pornography are not as readily apparent as the concrete dangers of sexual activity and can be more subtle. Regardless of the intentions of the parties, there is no guarantee that private photographic images will always remain private.

2. The statute does not criminalize wholly innocent conduct. The conduct underlying the recording was legal but the recording was not.

3. Even though the Illinois Constitution provides greater privacy protections than the federal constitution, defendant's claim is not cognizable under the privacy clause of the Illinois Constitution. Ill. Const. 1970, Art. I, §6. Privacy claims in the context of criminal prosecutions have only been recognized where the government or its agents intrude on the privacy of the defendant. The mere fact that the recording of the sex act took place in private, rather than in public, does not implicate the privacy clause.

4. Because the pornography statute is clear and definite, and defendant's ignorance of the statute is no defense, the court rejected defendant's argument that the anomaly between the pornography statute and the sexual assault statute prevented him from having fair notice that his conduct in photographing the legal sex act was criminal.

5. When the legislature raised the age limit of the pornography statute to 18, it did not express any concerns about 17-year-olds not being able to appreciate the subtle dangers of memorializing sexual activity. Its motivation was to aid law enforcement in the prosecution of child pornography. A law will be upheld if there is any conceivable basis for finding a rational relationship to a legitimate legislative purpose, even if that purpose did not in fact motivate the legislative action. Moreover, the desire to aid law enforcement is also rationally related to a legitimate legislative purpose.

6. Defendant's equal protections challenges are rejected for the same reasons as his due process

challenges, as those claims are also subject to a rational-basis analysis.

Burke, J., joined by Freeman, J., dissented. The case should be rebriefed to address the effect of the "holding" of **United States v. Stevens**, 559 U.S. __, 130 S. Ct. 1577 (2010), that "child pornography, for purposes of the first amendment, exists only if it is 'an integral part of conduct in violation of a valid criminal statute.'"

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Williams, 235 Ill.2d 178, 920 N.E.2d 446 (2009)

Defendant was convicted of two counts of unlawful use of recorded sounds or images in violation of 720 ILCS 5/16-7(a)(2), and two counts of unlawful use of unidentified sound or audiovisual recordings in violation of 720 ILCS 5/16-8. The former statute prohibits the intentional, knowing or reckless transfer of sounds or images without the consent of the copyright owner, while the latter statute prohibits the intentional, knowing or reckless distribution of recorded material if the packaging fails to contain the actual name and address of the manufacturer and the names of the performers.

1. The court concluded that §16-7(a)(2), which governs the sale of sound or video recordings without the consent of the owner, has been preempted by federal copyright law. Therefore, the convictions under §16-7 were required to be reversed.

A. Whether a state statute is preempted by federal law is a question of congressional intent. Federal law preempts state law in three situations: (1) where Congress explicitly preempts state action; (2) where Congress has enacted a comprehensive regulatory scheme which impliedly preempts the entire field from State regulation; and (3) where State action conflicts with state law. Federal preemption presents a question of law that is subject to *de novo* review.

B. Whether a State law which creates a criminal offense for copyright infringement has been preempted is determined by a two-part test: (1) whether the work in question is fixed is tangible form and comes within copyright law, and (2) whether the elements of a federal cause of action for copyright infringement are equivalent to the elements of the state crime. Because federal law provides that all equivalent legal rights concerning copyrights fixed after February 15, 1972 are to be governed by federal rather than state law, and because §16-7(a)(2) does not contain an additional element that would make it a non-equivalent claim, the court concluded that §16-7(a)(2) has been preempted by the federal law.

The court rejected the State's argument that Congress intended to preempt only State civil contempt laws, and not state criminal laws.

2. The court concluded, however, that defendant's convictions under §16-8, which requires identification of the manufacturer of audio or sound recordings on the external packaging, were proper. First, §16-8 does not violate due process, because it has a rational relationship to the legitimate public interest of protecting consumers from buying pirated recordings.

Second, §16-8 is not unconstitutionally overbroad as a violation of First Amendment rights. Generally, a person to whom a statute may be constitutionally applied is not permitted to challenge the statute solely on the ground that it may be unconstitutional if applied in other contexts. An exception to this rule is made in First Amendment issues, however, due to the concern that constitutionally protected expression may be deterred by an overbroad statute. Furthermore, conduct which has both speech and "nonspeech" elements may be regulated if the statute furthers a substantial governmental interest that is unrelated to the suppression of free speech, and the incidental restriction of First Amendment concerns is no greater than necessary to further the governmental interest in question.

The court concluded that §16-8 has several factors which significantly narrow its application to the legitimate public interest it is intended to protect. First, the statute requires identification of the manufacturer only if the work is offered in "for profit" transactions. Second, use of a stage or performing name is adequate to comply with the identification requirement of the statute, allowing performers to preserve their anonymity. Under these circumstances, any overbreadth is insignificant in light of the statute's legitimate reach, and any incidental restriction on First Amendment activity is no greater than necessary to further the governmental

interest involved.

(Defendant was represented by Assistant Defender Ahmed Kosoko, Chicago.)

Wilson v. County of Cook, 2012 IL 112026 (No. 112026, 4/5/12)

The Supreme Court reversed the trial court's dismissal of a challenge to the constitutionality of a Cook County ordinance banning assault weapons, and remanded the cause for further proceedings. In the course of its holding, the court rejected the plaintiff's argument that the ordinance is void for vagueness and violates equal protection.

1. The void for vagueness doctrine has two purposes: to provide persons of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, and to provide reasonable standards for enforcement in order to prevent arbitrary and discriminatory enforcement. The court concluded that the county ordinance is not unconstitutionally vague, noting that the plaintiff's argument demonstrated that there is little question as to the scope of the ordinance.

2. The court also rejected the argument that the ordinance violates equal protection, finding that when read in its entirety the ordinance does not arbitrarily differentiate between two owners with similar firearms.

In re M.I., 2011 IL App (1st) 100865 (No. 1-10-0865, 12/23/11)

1. Whether a statutory command is mandatory or directory is a question of statutory construction. The principal rule of statutory construction is to give effect of the intent of the legislature. Mandatory and directory provisions are both couched in obligatory terms, but differ in that non-compliance with a mandatory provision voids the governmental action in question, while non-compliance with a directory provision does not have the same effect. In determining whether a statute is mandatory or directory, the term "shall" is not determinative.

Statutory language creating a procedural command to a government official is presumed to be directory rather than mandatory. However, this presumption is overcome by negative language prohibiting further action in the event of non-compliance with the statute or where the right intended to be protected by the statute would be injured if the statute was given a directory reading.

2. 705 ILCS 405/5-810(2) provides time limits for a hearing on the State's motion to designate a juvenile proceeding as an extended juvenile jurisdiction proceeding. Under §810(2), the trial court "shall" conduct a hearing within 30 days after the motion is filed, or within 60 days upon a showing of good cause for the delay.

The Appellate Court concluded that the time limitation was intended to be directory only, noting that the provision neither prohibits the trial court from conducting a hearing on the motion if the specified time frames are not honored nor requires dismissal of the motion if a timely hearing is not held. The court also found that the right in question - the right of the minor respondent to receive a hearing before being subjected to an EJJ proceeding and a stayed adult sentence - is not affected by the mere failure to hold a hearing within the specified time limits. The court acknowledged, however, that the minor could show prejudice from the failure to hold a timely hearing if the delay resulted in a different conclusion than would have been the case had the hearing been timely.

3. The minor, who was adjudicated delinquent under the EJJ statute and given both a juvenile sentence and a stayed adult sentence to be imposed only if he failed to successfully complete the juvenile sentence, lacked standing to challenge the constitutionality of the EJJ statute. The minor claimed that the statute was unconstitutionally vague because it lacked sufficient notice of the conduct which would result in violation of the juvenile sentence and imposition of the stayed adult sentence. The minor also claimed that the statute lacked sufficient guidelines for the trial court to determine whether the juvenile sentence should be revoked.

A party has standing to challenge the constitutionality of a statute only if he has sustained or is in

danger of sustaining a direct injury as a result of the statute. Because there had been no allegation that the respondent had violated the juvenile sentence and no reason to believe that the stayed adult sentence would ever be imposed, the court concluded that the challenge was premature. Thus, defendant lacked standing to challenge the constitutionality of the statute until such time as he was required to serve the adult sentence.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

In re Omar M., 2012 IL App (1st) 100866 (No. 1-10-0866, 6/29/12)

To survive a vagueness challenge, a law must provide people of ordinary intelligence with the opportunity to understand what conduct is prohibited, and it must provide a reasonable standard to law enforcement officials and to the judiciary to prevent arbitrary and discriminatory legal enforcement.

The EJJ statute explicitly provides that the minor may be required to serve the adult sentence if he violates the "conditions" of his sentence, and shall be required to serve the adult sentence if he commits a new "offense." Where the court orders provisions such as probation or drug counseling in addition to a juvenile detention term, those provisions are part of the EJJ prosecution "conditions." Where no provisions are imposed other than detention, the term "conditions" refers only to the minor's completion of the sentence and adherence to the Department of Corrections rules and regulations during that time. "Offense" is equally plain and unambiguous, meaning "criminal offense," or "all international, federal, or state offenses that are considered criminal within the State of Illinois." There is no precedent for finding a different vagueness standard for statutes related to juveniles.

Therefore, the EJJ statute is not unconstitutionally vague.

(Respondent was represented by Assistant Defender Heidi Lambros, Chicago.)

People v. Butler, 2013 IL App (1st) 120923 (No. 1-12-0923, 6/28/13)

"If during the commission of the offense [of first-degree murder], the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(3).

A statute is unconstitutionally vague if the terms as so ill defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than any objective criteria or facts. In the context of a vagueness challenge, due process is satisfied if: (1) the statute's prohibitions are sufficiently definite, when measured by common understanding and practices, to give a person of ordinary intelligence fair warning as to what conduct is prohibited; and (2) the statute provides sufficiently definite standards for law enforcement officers and triers of fact that its application does not depend merely on their private conceptions.

The firearm enhancement for first-degree murder provides sufficiently definite standards for its application by triers of fact to withstand a vagueness challenge, even though confusion could be avoided if the legislature provided more explicit guidance. While the enhancement provides for a wide range of sentences, the scope of the sentencing range is clear and definite. The court has no discretion whether to impose the enhancement. The standards for imposing the enhancement are clear. Depending on the injury caused by the firearm, the trial court exercises its discretion to impose a sentence in the 25-years-to-life range, allowing the trial court to engage in fact-based determinations based on the unique circumstances of each case.

The Appellate Court rejected the argument that because all defendants convicted of first-degree murder cause death, the injury standards of great bodily harm, permanent disability, permanent disfigurement, or death provide the court with no guidance. Situations could exist where the firearm would not be the proximate cause of death.

(Defendant was represented by Assistant Defender Christopher Kopacz, Chicago.)

People v. Kucharski, 2013 IL App (2d) 120270 (No. 2-12-0270, 3/29/13)

1. 720 ILCS 135/1-2(a)(1) creates the offense of harassment through electronic communications where electronic communications are used to make an "obscene" comment "with an intent to offend." The court rejected the argument that the statute violates the First Amendment because it is a content-based limitation which prohibits only obscene speech which is intended to offend, and not any other obscene speech.

The court found that §1-2(a)(1) is an attempt to regulate conduct which accompanies prohibited speech, and does not seek to regulate speech itself. Although speech may not be constitutionally proscribed because of the ideas it expresses, it may be restricted "because of the manner in which it is communicated or the action it entails." Because §1-2(a)(1) restricts obscene electronic communications due only to the purpose for which the communication is transmitted, and not because of the ideas that are expressed, the statute is constitutional.

2. The court rejected the argument that a communication is "obscene" under §1-2(a)(1) only if it satisfies the definition of "obscenity" established in **Miller v. California**, 413 U.S. 15 (1973) and embodied in the Illinois obscenity statute (720 ILCS 5/11-20(b)). The court concluded that **Miller** and §11-20(b) were intended to provide a definition of "obscene" for purposes of controlling the commercial dissemination of obscenity. Because the legislature did not intend to apply the definition of §11-20(b) to the electronic harassment statute, the court concluded that the ordinary dictionary definition of "obscene" should be employed. Thus, for purposes of the electronic harassment statute, the term "obscene" is defined as "disgusting to the senses" or "abhorrent to morality or virtue."

3. The court rejected the argument that 720 ILCS 135/1-2(a)(2) is unconstitutionally vague and overbroad on its face. Section 1-2(a)(2) creates the offense of harassment through electronic communications for interrupting, "with the intent to harass, . . . the electronic communication service of any person."

A criminal law may be declared unconstitutionally vague because it fails to provide sufficient notice to enable a person of ordinary intelligence to understand what conduct is prohibited, or because it fails to provide sufficient standards to avoid arbitrary enforcement. To prevail on a vagueness challenge to a statute that does not infringe on First Amendment rights, the defendant must establish that the statute is vague as applied to the conduct for which he or she is being prosecuted. A statute that does not impact First Amendment rights will be declared unconstitutionally vague only if it is incapable of any valid application.

The court concluded that the harassment through electronic communication statute prohibits conduct rather than speech, and does not affect First Amendment rights. Therefore, the statute is not unconstitutional on its face. The court also rejected the argument that the statute is vague because the term "interrupt" is undefined, concluding that when the term is given its ordinary dictionary meaning the statute is sufficient to give adequate notice and prevent arbitrary enforcement.

The court also rejected the argument that the electronic harassment statute violates the First Amendment because it restricts speech that is merely "annoying." The court concluded that to come within the scope of the word "harass," the interruption must be made "with the intent to produce emotional distress or discomfort substantially greater than mere annoyance."

4. 720 ILCS 5/16D-5.5(b)(1) provides that a person "shall not knowingly use or attempt to use encryption" to "commit, facilitate, further, or promote any criminal offense." The term "encryption" is defined as the use of "any protective or disruptive measure, including, without limitation, cryptography, enciphering, encoding, or a computer contaminant," to prevent, impede, delay or disrupt access to data, to make data unintelligible or unusable, or to prevent, impede, delay or disrupt the normal operation or use of a component or device.

The court concluded that §5/16D-5.5(b)(1) is intended to apply only where the defendant engages in "some type of data transformation, manipulation, or destruction." Merely changing the password on another's social media account does not fall within this definition. Thus, defendant's conviction for unlawful use of encryption, which was based on changing his former girlfriend's password to her MySpace account, was reversed.

People v. Vasquez, 2012 IL App (2d) 101132 (No. 2-10-1132, 6/4/12)

Due process requires that a statute be sufficiently clear that persons of common intelligence are not required to guess at its meaning or application. A sentencing statute does not satisfy due process if its terms are so ill-defined that the ultimate decision as to its meaning rests on the opinions and whims of the trier of fact rather than objective criteria.

Due process does not require mathematical certainty, however, and will be satisfied if: (1) the statute's prohibitions are sufficiently definite, when measured by common understanding and practices, to give a person of ordinary intelligence fair warning as to what conduct is prohibited; and (2) the statute marks boundaries sufficiently distinct for judges and juries to administer the law fairly in accordance with the intent of the legislature.

The aggravated DUI statute provides that where the offense results in the death of multiple persons, a sentence of imprisonment shall be imposed "unless the court determines that extraordinary circumstances exist and require probation." 625 ILCS 5/11-501(d)(2)(G).

The statute is not unconstitutionally vague. First, the phrase "extraordinary circumstances" is capable of being understood by its plain and ordinary meaning. Black's Law Dictionary defines the term as "a highly unusual set of facts that are not commonly associated with a particular thing or event."

Second, the statute provides sufficient guidance such that reasonable defendants and sentencing judges are not without objective criteria for its application. The statute requires both extraordinary circumstances and that those circumstances require probation. Therefore, as used in the statute, "extraordinary circumstances" contemplates those that are mitigating. Guidance as to what constitutes a mitigating circumstance is provided by the statutory definition of mitigating factors. 730 ILCS 5/5-5-3.1. A defendant and a court can look to those factors and assess whether the evidence of those factors is highly unusual for the situation and requires probation. At the same time, the statute does not constrain the court from considering, in its discretion, any relevant extraordinary circumstance.

Third, the legislative objective of the statute sufficiently guides the statute's application. Generally, the Code of Corrections creates a presumption in favor of probation. Under §11-501(d)(2)(G), there is a presumption of incarceration that may be overridden in the court's discretion, but not lightly.

The statute was upheld because it provides sufficient guidance for application.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

People v. Schmidt, 405 Ill.App.3d 474, 938 N.E.2d 559 (3d Dist. 2010)

720 ILCS 646/35, which prohibits a person from knowingly using or allowing the use of a vehicle, structure, real property or personal property within his control to commit a methamphetamine violation, does not violate due process. Furthermore, §35 is not unconstitutionally overbroad or vague.

Legislation which does not affect a fundamental constitutional right satisfies due process if: (1) it bears a reasonable relationship to the public interest intended to be served by the statute, and (2) the means adopted are reasonable to accomplish the desired objective. Because defendant was charged with using his personal vehicle to commit a methamphetamine violation, the court found that it need not consider other scenarios which might have presented issues concerning the constitutionality of §35. The court also held that the statute bears a rational relationship to the interest of safeguarding the public from the harm caused by manufacturing and distributing methamphetamine. Furthermore, the statute adopts a reasonable method of protecting the public by prohibiting the use of a vehicle to manufacture or possess methamphetamine.

The court rejected the argument that the statute is void for vagueness, finding that it is sufficiently clear to provide fair notice to a person with ordinary intelligence that using a vehicle to commit a methamphetamine crime constitutes the offense of unlawful use of property. In addition, the statute is not subject to arbitrary or discriminatory enforcement.

Finally, the court rejected the argument that §35 is overbroad because it is impossible to violate the Methamphetamine Control and Community Protection Act without also committing unlawful use of property.

Under U.S. Supreme Court precedent, an overbreadth argument rarely will succeed where the law in question does not specifically address speech or conduct necessarily associated with speech (such as picketing or demonstrating). (See **Virginia v. Hicks**, 539 U.S. 113 (2003)).

(Defendant was represented by Assistant Defender Jay Wiegman, Ottawa.)

People v. Farmer, ___ Ill.App.3d ___, ___ N.E.2d ___ (1st Dist. 2011) (No. 1-08-3185, 6/1/11)

Generally, a person to whom a statute may be constitutionally applied is not allowed to challenge the statute solely on the ground that the statute could be applied unconstitutionally to another person in a different context. An exception exists in First Amendment cases where a statute may be challenged as overbroad due to the concern that constitutionally-protected activity may be deterred or chilled. This constitutional concern must be counterbalanced with the substantial social costs created by the overbreath doctrine when it blocks application of a law to unprotected speech. Thus a statute is overbroad only if it: (1) criminalizes a substantial amount of protected activity, relative to the law's plainly legitimate sweep; and (2) is not susceptible to a limiting construction that avoids constitutional problems.

Content-based speech restrictions are ordinarily subject to strict scrutiny. An exception to this rule is traditional categories of unprotected speech. False statements of fact are often at the heart of the traditional categories of unprotected speech, e.g., perjury. The First Amendment does, however, require that we protect some falsehoods in order to protect speech that matters. The State also has a compelling interest in safeguarding minors. Courts have upheld laws aimed at protecting minors even when they operate in the sensitive area of constitutionally-protected rights, including the right to free speech.

Defendant challenged the false personation of a parent/legal guardian statute as overbroad. False personation is committed when one "falsely represents himself or herself to be the parent, legal guardian, or other relation of a minor child to any public official, public employee, or elementary or secondary school employee or administrator." 720 ILCS 5/32-5.3 (2002). This statute is a content-based regulation of speech. Generally, family relationships are not a matter of public interest and concern. Many false statements of this sort lack the element of private or public injury that accompanies traditionally unprotected categories of speech, and are innocently made.

Because the false personation statute does not specify a mental state, the court concluded that it could read a culpable mental state into the statute that would place a limiting construction on the statute and eliminate any constitutional concerns. Reading the statute to require that the false statement be made knowingly with the intent to deceive the relevant public official or employee would advance the State's interest in protecting minors while limiting the punishment of speech to cases where a person knowingly deceives a public official or employee to frustrate the operations of government in the protection of minors.

The court concluded that with that limiting construction, the false personation statute is not overbroad.

(Defendant was represented by Assistant Defender Jessica Arizo, Chicago.)

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§48-3(c)
Classifications

In re Griffiths, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973) A State which adopts a suspect classification bears a heavy burden of showing it permissible.

Lehnhausen v. Lake Shore Auto, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) Illinois law which allows taxes on personal property of individuals does not violate equal protection.

Graham v. Richardson, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971) State law which conditioned welfare payments on citizenship and residency requirement denied equal protection. The characterization of governmental benefit as "right" or "privilege" is not determinative of constitutional rights.

Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973) States may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.

Labine v. Vincent, 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971) State inheritance statute which favored legitimate over illegitimate children upheld.

Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) Statute which denied access of unmarried persons to contraceptives violated equal protection; difference in treatment was not rational.

Michael M. v. Supreme Court, 450 U.S. 464, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981) A majority of the Supreme Court has never held that gender-based classifications are "inherently suspect" and subject to "strict scrutiny." However, the traditional minimum rationality test takes on a somewhat "sharper focus" when gender-based classifications are challenged.

A state statutory rape law under which only males may be criminally liable was upheld.

Kirchberg v. Feenstra, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981) Equal protection was violated by State statute which made husband "head and master" of jointly owned property, with the right to dispose of it without wife's consent. This is "the type of express gender-based discrimination that we have found unconstitutional absent a showing that the classification is tailored to further an important governmental interest."

Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) State statute which prohibited the sale of beer to males under 21 years and to females under 18 years violated equal protection; differential in age did not serve important governmental objection. See also, **Parham v. Hughes**, 441 U.S. 347, 99 S.Ct. 1742, 60 L.Ed.2d 269 (1979) (statute which precluded a father who has not legitimated a child from suing for wrongful death was upheld); **Frontiero v. Richardson**, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) (federal statute that treated spouses of male military personnel different than spouses of female military personnel was invalid).

Stanley v. Illinois, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) State statute which prevented unwed father from having custody of his children after the death of the mother, unless he applied for adoption, denied due process.

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) State law which gives a mandatory preference to males as administrators of estates violates equal protection.

Stanton v. Stanton, 421 U.S. 7, 95 S.Ct. 1373, 43 L.Ed.2d 688 (1975) Equal protection violated by State law under which, in the context of child support, girls attain majority at 18 years but boys do not attain majority until 21 years. The Court declined to decide whether a father is liable for child support until both his son and daughter reached 21 years or until they both reached 18 years — this is an issue of state law.

Schlesinger v. Ballard, 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (1975) Statutory scheme which requires mandatory discharge of male naval officers with more than nine years of active service who fail for the second time to be selected for promotion, but requires similar discharge of female officers only after 13 years of service, is not unconstitutional. The different treatment is based on the fact that female officers, because of restrictions on combat and sea duty, lack the same opportunities as male officers. Congress could

rationally conclude that a longer period of tenure for women officers is necessary for fair and equitable career advancement.

Bennis v. Michigan, 516 U.S. 442, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996) Neither due process nor the "takings clause" of the Fifth Amendment is violated by a State forfeiture statute that fails to provide an "innocent owner" defense to forfeiture of an instrument used in a crime. Therefore, the constitution was not violated by forfeiture of an innocent spouse's interest in an automobile that had been used by her spouse, without her knowledge, to commit a criminal act with a prostitute.

Bernier v. Burris, 113 Ill.2d 219, 497 N.E.2d 763 (1986) Although the guarantee of equal protection and prohibition against special legislation are not identical, they are "generally judged by the same standard." The standard for determining equal protection challenges (where there is no suspect or quasi-suspect classification) is "whether the legislation bears a rational relationship to a legitimate governmental interest."

People v. Palkes, 52 Ill.2d 472, 288 N.E.2d 469 (1972) The test of any legislative classification essentially is one of reasonableness. Classifications which are reasonably calculated to promote or serve a proper police power purpose are not forbidden.

People v. R.G., 131 Ill.2d 328, 546 N.E.2d 533 (1989) When a statute limits a fundamental right it may survive only if a compelling State interest exists. A statute that does not affect a fundamental right need only have a rational relation to the purpose the legislature sought to accomplish by enacting the statute.

People v. Ellis, 57 Ill.2d 127, 311 N.E.2d 98 (1974) A classification based on sex is a "suspect classification" under the Illinois Constitution. Therefore, to be valid it must withstand "strict judicial scrutiny."

The distinctions in the treatment of 17-year-old males and 17-year-old females under the Juvenile Court Act is not based upon a compelling State interest, and is invalid.

People v. Whitfield, 228 Ill.2d 502, 888 N.E.2d 1166 (2007) The trial court lacked discretion to grant credit for the eight months defendant spent on a probation term for which he was ineligible. Equal protection does not require that defendants who serve void probation terms receive the same credit as persons who violate probation and are sentenced to prison.

People v. McCabe, 49 Ill.2d 338, 275 N.E.2d 407 (1971) Statute which classified the sale of marijuana with the sale of narcotics, rather than with the sale of drugs named in the Drug Abuse Act, is unreasonable. There must be a reasonable basis for distinguishing the class to which a law is applicable from the class to which it is not.

People v. Bradley, 79 Ill.2d 410, 403 N.E.2d 1029 (1980) Due process was violated by a statute which provided a greater penalty for possession than for delivery of the same controlled substances.

People v. Upton, 114 Ill.2d 362, 500 N.E.2d 943 (1986) Statute which allowed a greater sentence for distribution of "look-alike" or fraudulent controlled substances than for distribution of certain controlled substances was upheld. Some of the rationales of the legislature were "plausible enough to meet the standard of bearing a real or substantial relation to the larger objective of the Controlled Substances Act."

People v. Fisher, 184 Ill.2d 441, 705 N.E.2d 67 (1998) Equal protection is not violated by provisions of the Illinois Vehicle Code which impose a two-year-suspension of a driver's license for a non-first-time offender who refuses to submit to chemical testing after an arrest for DUI, but require only a one-year-suspension for

persons who submit to testing and are found to have a blood-alcohol content in excess of the legal limit. Similarly, equal protection was not violated by provisions permitting a non-first-time offender who fails chemical testing to apply for a hardship driving permit after 90 days, while prohibiting the issuance of hardship permits for non-first offenders who refuse to submit to chemical testing. The distinction between drivers who refuse to submit to chemical testing and those who fail such testing is rationally related to the goal of improving highway safety, because it provides an incentive for drivers to comply with implied consent laws and promotes highway safety by permitting authorities to remove impaired drivers from the highways.

Nor was equal protection violated because non-first offenders who refuse chemical testing and who are subject to a two-year license suspension may receive hardship relief if they are under the age of 21. The court refused to assume that non-first offenders under the age of 21 present a greater risk to highway safety than non-first offenders over that age, and declined a request to take judicial notice of that assertion. In the absence of any evidence on that point, defendants failed to carry their burden of showing an equal protection violation.

People v. Coleman, 111 Ill.2d 87, 488 N.E.2d 1009 (1986) Statute which prohibited supervision for a DUI offense if defendant had received supervision for the same offense within the previous five years was upheld. There was a rational basis for distinguishing between those who have previously undergone supervision and those who have not.

People v. Eckhardt, 127 Ill.2d 146, 535 N.E.2d 847 (1989) Statute providing that a defendant is not eligible for supervision for DUI if, within five years, he pleaded guilty pursuant to a plea agreement to reckless driving was upheld. A person who plea bargained to a charge of reckless driving is in a different position from a person who entered a blind plea to that charge.

People v. Morris, 136 Ill.2d 157, 554 N.E.2d 235 (1990) Statute providing for a Class 2 felony of possession of an altered temporary registration permit (Ch. 95½, ¶4-104(a)(3)) was unconstitutional as applied; defendant altered the expiration date of his own temporary registration permit on his own vehicle.

> "A Class 2 penalty for a person who alters a temporary registration permit for a vehicle which he or she owns or to which he or she is legally entitled is not reasonably designed to protect automobile owners against theft, nor is it reasonably designed to protect the general public against the commission of crimes involving stolen motor vehicles. Such a penalty is violative of the due process clause of our constitution, and may not stand."

People v. Bryant, 128 Ill.2d 448, 539 N.E.2d 1221 (1989) Possession of stolen motor vehicle statute does not violate due process and proportionate penalties because it punishes possession of a stolen motor vehicle as a Class 2 felony while the offense of theft is punished as a Class 3 felony.

People v. Bales, 108 Ill.2d 182, 483 N.E.2d 517 (1985) The classification of residential burglary as a Class 1 felony does not violate equal protection. There is a reasonable basis for the classification — "to deter the unlawful entry into dwelling places and thus protect the privacy and sanctity of the home" - and there "is a considerably greater chance of injury and danger to persons in the home context than in the burglary of a place of business." See also, **People v. Harmison**, 108 Ill.2d 197, 483 N.E.2d 508 (1985) (statute mandating fine for drug offenses does not violate equal protection).

People v. Anderson, 112 Ill.2d 39, 490 N.E.2d 1263 (1986) The lack of periodic imprisonment facilities in a county does not violate equal protection under the Illinois Constitution. The equal protection clause is "limited to instances of purposeful or invidious discrimination. Invidious discrimination occurs when

government withholds from a person or class of persons a right, benefit or privilege without a reasonable basis for the governmental action."

People v. Anderson, 148 Ill.2d 15, 591 N.E.2d 461 (1992) Hazing statute did not violate equal protection or constitute special legislation because it applies only to persons in academic institutions. For a classification to be valid under equal protection and special legislation analysis, it need only have a rational relationship to a legitimate state objective. Because most hazing occurs in schools, limiting the statute to schools is rationally related to the legitimate state purpose of preventing physical injury.

People v. Shephard, 152 Ill.2d 489, 605 N.E.2d 518 (1992) Statute which enhances possession of certain controlled substances to Class X felonies when committed within 1000 feet of a public housing project, does not violate equal protection.

The provision does not impose more serious punishment on offenders who live in public housing. The statute enhances the offense based on the fact that it occurs within 1000 feet of a public housing project, not on the offender's place of residence.

Statute does not affect any fundamental constitutional right; therefore, the statute is not subject to the "strict scrutiny" test. Because the impact of drug activity in and around public housing has been severe, there is a rational basis for enhancing drug offense penalties in such areas.

People v. Adams, 149 Ill.2d 331, 597 N.E.2d 574 (1992) 730 ILCS 5/5-5-3(g), which requires HIV testing upon conviction of certain sex-related offenses, does not violate equal protection. First, the statute does not create a gender-based clarification, but applies equally to male and female offenders. Second, there is a rational relationship between mandatory testing of persons convicted of certain sex-related offenses and the goal of promoting public health, because those offenses involve behavior carrying a high risk of transmitting HIV.

Further, the statute does not violate the constitutional prohibition against unreasonable search and seizure.

People v. Reed, 148 Ill.2d 1, 591 N.E.2d 455 (1992) Defendant was charged with aggravated criminal sexual abuse in violation of section 12-16(d), which enhances an act of sexual penetration with a person between 13 and 17 from a Class A misdemeanor to a Class 2 felony if defendant is more than five years older than the victim.

Section 12-16(d) does not violate equal protection, as there is a rational basis for distinguishing between adults who engage in sexual activities with minors at least five years younger and persons who engage in the same activities but who are within five years of their victim's age. Because only adults can commit sexual acts with minors who are at least five years younger and also at least 13 years old, the purpose of §12-16(d) is to protect children from sexual exploitation by adults. The legislature could logically conclude that an adult who is at least five years older than the minor poses a greater risk of exploitation than an offender who is closer in age to the victim; in the latter case, similar levels of maturity reduce the potential for overreaching or undue influence.

People v. Kimbrough, 163 Ill.2d 231, 644 N.E.2d 1137 (1994) Defendant was charged with violating provisions of the Controlled Substances Act that base the classification of the offense on either the weight of pure LSD or the number of "objects" or "segregated parts" delivered in dosage form. Under these provisions, delivery of 15 or more but less than 200 "objects" is a Class X felony, while delivery of cocaine in pure form becomes a Class X felony only where more than 15 and less than 100 grams are involved. Defendant was charged with delivering and possessing 94 to 96 "microdots" weighing approximately .4 grams (a Class X felony), and with unlawful possession of .4 grams of pure LSD (a Class 1 felony).

The "object-weight" statutory scheme does not violate equal protection and due process. A statutory

classification that neither affects fundamental constitutional rights nor is based on a "suspect classification" satisfies equal protection and due process if there is, under any reasonable factual situation, a rational relationship between the classification and a legitimate state interest. Because LSD is normally distributed in "carrier" form, the legislature could have concluded that LSD in that form presents a greater danger to the public than does the delivery of pure LSD. Thus, punishing possession or delivery of "objects" more severely than possession or delivery of the same weight of pure LSD is rationally related to the State's interest in deterring the distribution of LSD.

In addition, retaining the provisions of the Act basing criminal penalties on weight was rational; otherwise, major distributors of pure LSD would be treated as having possessed only one "object," no matter how many doses the substance would constitute when distributed.

Further, the legislature intended that delivery or possession of individual doses may be charged only as "objects," while delivery or possession of "pure" LSD can be charged only based on weight. Thus, because prosecutors do not have discretion to charge possession or delivery of the same substance as either "objects" or "pure" LSD, similarly situated defendants cannot be subjected to disparate treatment, and mere possession cannot carry a more severe penalty than delivery.

People v. Bailey, 167 Ill.2d 210, 657 N.E.2d 953 (1995) Exception to stalking statute for picketing during "bona fide labor disputes" does not violate equal protection. There is a rational basis to exempt labor picketing from the stalking statute, because the legislature could reasonably conclude that "stalking-type" conduct was unlikely to occur during labor picketing and that union activities are constitutionally protected.

People v. Lee, 167 Ill.2d 140, 656 N.E.2d 1065 (1995) Aggravated battery with a firearm statute does not violate due process. At the time of defendant's conviction, ¶12-4.2(a) provided that aggravated battery with a firearm occurred when, in the course of a battery, defendant knowingly caused "any injury to another" by "means of the discharging of a firearm." Aggravated battery with a firearm is a nonprobationable Class X felony punishable by imprisonment for a term of six to 30 years.

A statute violates due process only where the penalty for a crime is not reasonably tailored to its threat to public health, safety and general welfare. A Class X classification for aggravated battery with a firearm is reasonably related to the act of inflicting injury by knowingly discharging a firearm - the threat to society identified by the legislature.

Also, no constitutional violation is created by the fact that a longer sentence can be imposed for aggravated battery with a firearm than for some offenses in which the victim dies; the degree of harm inflicted is but one factor in determining the seriousness of an offense, and the legislature could legitimately believe that a Class X sentence was required to reduce the frequency of injuries, high risk of bodily harm, and "unique threat" presented by the discharge of firearms.

People v. M.D., 231 Ill.App.3d 176, 595 N.E.2d 702 (2d Dist. 1992) The presence or absence of sexual penetration is not a rational basis on which to distinguish between legal and illegal forced sexual exploitation of a spouse. Therefore, the statutory scheme which permits a marital exemption on that basis violates due process and equal protection. Note: The statutory marital exemption has been repealed.

People v. Downin, 357 Ill.App.3d 193, 828 N.E.2d 341 (3d Dist. 2005) The aggravated criminal sexual abuse statute (720 ILCS 5/12-16(d)) does not violate equal protection although unmarried 16-year-olds are prohibited from engaging in sexual intercourse, even with parental consent, while 16-year-olds who receive parental consent to marry are permitted to engage in intercourse. The purpose of §12-16(d) is to protect persons under the age of 17 from sexual exploitation by adults, and unmarried and married 16-year-olds are not similarly situated for purposes of equal protection analysis.

People v. Perea, 347 Ill.App.3d 26, 807 N.E.2d 26 (1st Dist. 2004) 705 ILCS 405/5-805(2)(a), which upon

a finding of probable cause authorizes adult prosecution of a minor who is at least 15 and who is charged with a Class X felony, requires adult sentencing if the minor is acquitted of the offense which led to his transfer but convicted of a different Class X felony. Thus, the trial court lacks authority to order juvenile sentencing of such minors.

Due process and equal protection are not violated by the presumptive transfer statute on the basis that persons presumptively transferred to adult court are treated more harshly than juveniles transferred under the automatic transfer statute (705 ILCS 405/5-130(2)) or the extended juvenile jurisdiction statute (705 ILCS 405/5-810)). The presumptive transfer statute is not unconstitutionally vague because it fails to provide sufficient notice that adult sentencing may be required even if the minor is acquitted of the predicate felony for which the transfer was ordered.

People v. McGee, 257 Ill.App.3d 229, 628 N.E.2d 867 (1st Dist. 1993) Statute which provides a higher sentence for possessing a fraudulent license than it does for the greater offense of distributing such a license violates equal protection and due process.

People v. Runge, 346 Ill.App.3d 500, 805 N.E.2d 632 (3d Dist. 2004) 720 ILCS 5/31-6(b)(1), which creates the offense of escape by a person committed as a sexually violent person, does not violate equal protection.

Cumulative Digest Case Summaries **§48-3(c)**

In re Jonathan C.B., ___ Ill.2d ___, ___ N.E.2d ___ (2011) (No. 107750, 6/30/11)

1. The court rejected the argument that because minors accused of sex offenses are subject to more serious sanctions than other delinquent minors, they are entitled to jury trials as a matter of due process and equal protection under the Illinois and federal constitutions. The court acknowledged that minors accused of sex offenses are denied the benefit of confidentiality of court records, but noted that such minors have a diminished expectation of privacy. The court also noted that the lack of confidentiality and collateral consequences such as the requirement to submit DNA samples and ineligibility of expungement are related to rehabilitation because such measures identify persons who are at risk for recidivism.

Furthermore, delinquency adjudications for felony sex offense carry only indeterminate juvenile sentences and not more serious adult sentences. Finally, the court reiterated precedent that sex offender registration is a public safety measure rather than a punishment mandating the right to a jury trial, and found that in any event juvenile offender registration is less onerous than adult registration because the information is available to a smaller group of persons and juveniles may petition to terminate the registration requirement.

In rejecting defendant's argument, the court also found that accepting the minor's argument would offend principles of *stare decisis* by overruling long-standing precedent concerning the nature of juvenile delinquency proceedings. The minor "has failed to provide this court with good cause or compelling reasons to depart from our prior decisions."

2. The Court rejected the argument that because minors adjudicated delinquent of sex offenses are similarly situated to persons who have the right to a jury trial under extended juvenile jurisdiction and as adult offenders, the absence of the right to a jury trial in sex offense delinquency proceedings violates equal protection. The equal protection clause prohibits disparate treatment of similarly situated individuals. Unless fundamental rights are at issue, equal protection challenges are resolved under the "rational basis" test, which considers whether the challenged classification bears a rational relationship to a legitimate governmental purpose.

The court concluded that minors adjudicated delinquent for sex offenses cannot meet the threshold requirement of showing that they are similarly situated to either juveniles subjected to extended juvenile jurisdiction prosecutions or to adult sex offenders. Minors found delinquent under extended juvenile jurisdiction and adult sex offenders face severe deprivations of their liberty, including mandatory

incarceration and adult sentences. By contrast, a minor adjudicated delinquent for a sex offense does not face the possibility of an adult criminal sentence, and instead receives a sentence that automatically terminates at age 21.

The court also rejected the argument that equal protection principles are triggered because juvenile sex offenders may face a future loss of liberty under the Sexually Violent Persons Act; commitment under the Act requires a separate, successful action by the State and proof of additional elements that are not common to all sex offenses.

Defendant's adjudications for criminal sexual assault and attempt robbery were affirmed.

(Defendant was represented by Assistant Defender Catherine Hart, Springfield.)

People v. Hollins, 2012 IL 112754 (No. 112754, 6/21/12)

The Illinois Supreme Court upheld the conviction of defendant for child pornography against due process and equal protection challenges.

The 32-year-old defendant and his 17-year-old girlfriend were college students who engaged in legal consensual sex. Defendant used his cell phone to take extreme closeup photographs of the couple's genitals. At her request, defendant emailed the photos to his girlfriend. They were discovered when her mother accessed her account. While defendant did not violate any law when he had sexual intercourse with his girlfriend, his recording of that act violated the child pornography statute, which sets 18 as the age at which a person may be legally photographed engaging in sexually explicit conduct. 720 ILCS 5/11-20.1(a)(1).

1. Defendant conceded that his case did not implicate a fundamental right, and therefore the test for determining whether the statute complies with substantive due process is the rational-basis test. A statute will be upheld under this test so long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable.

The court rejected defendant's argument that the application of the child pornography statute to persons old enough to consent to the private sexual activity they have chosen to photograph does not serve the statute's purpose, which is to prevent the sexual abuse and exploitation of children. The State's legitimate interest in protecting the psychological welfare of children is served by having a higher age threshold for appearance in pornography than to consent to sexual activity. The dangers of appearing in pornography are not as readily apparent as the concrete dangers of sexual activity and can be more subtle. Regardless of the intentions of the parties, there is no guarantee that private photographic images will always remain private.

2. The statute does not criminalize wholly innocent conduct. The conduct underlying the recording was legal but the recording was not.

3. Even though the Illinois Constitution provides greater privacy protections than the federal constitution, defendant's claim is not cognizable under the privacy clause of the Illinois Constitution. Ill. Const. 1970, Art. I, §6. Privacy claims in the context of criminal prosecutions have only been recognized where the government or its agents intrude on the privacy of the defendant. The mere fact that the recording of the sex act took place in private, rather than in public, does not implicate the privacy clause.

4. Because the pornography statute is clear and definite, and defendant's ignorance of the statute is no defense, the court rejected defendant's argument that the anomaly between the pornography statute and the sexual assault statute prevented him from having fair notice that his conduct in photographing the legal sex act was criminal.

5. When the legislature raised the age limit of the pornography statute to 18, it did not express any concerns about 17-year-olds not being able to appreciate the subtle dangers of memorializing sexual activity. Its motivation was to aid law enforcement in the prosecution of child pornography. A law will be upheld if there is any conceivable basis for finding a rational relationship to a legitimate legislative purpose, even if that purpose did not in fact motivate the legislative action. Moreover, the desire to aid law enforcement is also rationally related to a legitimate legislative purpose.

6. Defendant's equal protections challenges are rejected for the same reasons as his due process challenges, as those claims are also subject to a rational-basis analysis.

Burke, J., joined by Freeman, J., dissented. The case should be rebriefed to address the effect of the "holding" of **United States v. Stevens**, 559 U.S. __, 130 S. Ct. 1577 (2010), that "child pornography, for purposes of the first amendment, exists only if it is 'an integral part of conduct in violation of a valid criminal statute.'"

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Masterson, 2011 IL 110072 (No. 110072, 9/22/11)

The Equal Protection Clause requires that the government treat similarly situated individuals in a similar fashion, unless it can demonstrate an appropriate reason to treat them differently. The level of scrutiny applied to an equal protection challenge is determined by the nature of the right affected. "Strict scrutiny" analysis is applied when the challenge involves a fundamental right or suspect classification based on race or national origin. In such cases, the classification satisfies the equal protection clause if it is narrowly tailored to serve a compelling State interest.

The "rational basis" test is applied where the classification does not involve a fundamental right or suspect classification. Under this standard, the statute survives the challenge if it bears a rational relationship to a legitimate government purpose.

Finally, "intermediate scrutiny" is applied to classifications based on gender, illegitimacy, and content-neutral incidental burdens to speech. The "intermediate scrutiny" standard requires a showing that the statute is substantially related to an important governmental interest.

As a threshold matter, equal protection analysis applies only where the individual raising the challenge can demonstrate that he is similarly situated to another group.

People v. Richardson, 2015 IL 118255 (No. 118255, 5/21/15)

The right to equal protection guarantees that similarly situated individuals will be treated in a similar manner unless the State can demonstrate an appropriate reason to treat them differently. When a legislative classification does not affect a fundamental right or discriminate against a suspect class, courts apply a rational basis scrutiny and consider whether the classification bears a rational relationship to a legitimate governmental purpose.

The State charged defendant, who was 17 years old at the time of the offenses, as an adult with criminal sexual assault and criminal sexual abuse. At the time of the offenses, the Juvenile Court Act only applied to minors under 17 years of age. The Act was subsequently amended to apply to minors under the age of 18. The amendment included a savings clause that made the changes in the statute applicable to offenses that occurred on or after the effective date of the amendment. 705 ILCS 405/5-120.

Defendant argued that the savings clause violated equal protection because he was similarly situated to 17-year-olds who committed offenses on or after the amendment's effective date, and there was no rational basis to treat him differently.

The Court rejected defendant's argument. It held that the legislative classification in the savings clause was rationally related to the legislature's goal of including 17-year-olds within the jurisdiction of the Juvenile Court Act. By limiting the amendment to offenses committed on or after the effective date, both defendants and courts are on notice as to whether the Act will apply. The savings clause also ensures that cases already in progress would not have to restart in juvenile court and defendants could not manipulate or delay proceedings to take advantage of the amendment.

The Court reversed the trial court's judgment declaring the savings clause unconstitutional as applied to defendant and remanded the cause for further proceedings.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

Wilson v. County of Cook, 2012 IL 112026 (No. 112026, 4/5/12)

The Supreme Court reversed the trial court's dismissal of a challenge to the constitutionality of a Cook County ordinance banning assault weapons, and remanded the cause for further proceedings. In the

course of its holding, the court rejected the plaintiff's argument that the ordinance is void for vagueness and violates equal protection.

1. The void for vagueness doctrine has two purposes: to provide persons of ordinary intelligence a reasonable opportunity to understand what conduct is prohibited, and to provide reasonable standards for enforcement in order to prevent arbitrary and discriminatory enforcement. The court concluded that the county ordinance is not unconstitutionally vague, noting that the plaintiff's argument demonstrated that there is little question as to the scope of the ordinance.

2. The court also rejected the argument that the ordinance violates equal protection, finding that when read in its entirety the ordinance does not arbitrarily differentiate between two owners with similar firearms.

In re M.A., 2014 IL App (1st) 132540 (No. 1-13-2540, 5/28/14)

The subsections of the Illinois Murderer and Violent Offender Against Youth Registration Act, 730 ILCS 154/1 *et seq.*, that make the Act automatically applicable to juveniles are facially unconstitutional since they violate procedural due process and equal protection.

1. The Act applies to juveniles who have been adjudicated delinquent for committing or attempting to commit a variety of violent crimes when the victim is under age 18, including aggravated battery and aggravated domestic battery, the offenses at issue here. The registration period lasts for 10 years. The juvenile must register within five days after entry of the sentencing order and must register as an adult within 10 days of turning 17 years old. There is no provision for a juvenile to be taken off the registry.

The Act requires the police to send the registration information to the offender's school district, and to all child care facilities, colleges and libraries in the county. The Act allows the police to disclose the offender's information to "any person likely to encounter a violent offender." Once the juvenile turns 17 and registers as an adult, the registration information is accessible to the public through a statewide database.

The 10-year period is automatically extended for another 10 years when an offender violates any registration requirement. Failure to register is a Class 3 felony and each subsequent violation is a Class 2 felony.

2. Procedural due process claims challenge the procedures used to deny a person life, liberty, or property. The primary components of due process are notice and an opportunity to be heard. In assessing procedural due process claims, courts consider the following factors: (1) the private interest affected by the official action; (2) the risk of erroneous deprivation of such interest; (3) the probable value of additional or substitute procedures; and (4) the State's interest, including the fiscal and administrative burdens of new or additional procedures.

Since the Act affects liberty and privacy interests, but does not entirely deprive a juvenile of those rights, it does not impair any fundamental constitutional rights. Thus, its provisions are analyzed under the rational basis test.

The mandatory requirement that juveniles who commit certain offenses must register as adults under the Act violates procedural due process. The Act automatically requires juvenile offenders to register as adults, with its attendant statewide publication of registration information, without any individualized assessment of their continuing risk to society.

While the initial registration following conviction might not violate due process under the rational basis test, the requirement that juveniles register as adults without any further process does. This is especially true given the transitory nature of youth and the absence of any significant administrative burdens that would be imposed in requiring a hearing to determine whether juveniles remain a danger to society at the time of adult registration.

3. An equal protection challenge asks whether a statute treats similarly situated individuals in a similar manner. Equal protection does not prohibit the legislature from drawing proper distinctions among different categories of people. Unless fundamental rights are at issue, the classification does not violate equal protection if it bears a rational relationship to the purpose of the statute.

The registration provisions for juvenile violent offenders against youth violate equal protection when compared to the registration procedures for juvenile sex offenders. The two groups are similarly situated because, although they were convicted of different offenses, they both belong to the same class of juvenile offenders who are required to register with the police.

The disparate treatment of the two groups does not bear a rational relationship to the purposes of the Act. The goal of registering both groups is the same: protection of the public. Juvenile sex offenders, however, do not have to register as adults and may petition to be taken off the registry after five years. The same legislative purposes would be served by providing these features to juvenile violent offenders against youth. The failure to do so results in disparate treatment for violent offenders and thus violates equal protection.

4. Although the Act violates procedural due process and equal protection, it does not violate substantive due process. A statute violates substantive due process if it impermissibly restricts a person's life, liberty, or property interests. In the absence of a fundamental right, the statute need only show a rational relationship to the legislative purpose behind its enactment.

In **In re J.W.**, 204 Ill.2d 50 (2003), the Illinois Supreme Court rejected a substantive due process challenge to the registration provisions for juvenile sex offenders, finding a rational relationship between registering juvenile sex offenders and the need to protect the public. The result in **In re J.W.** controls this case. There is a rational relationship between registering juvenile violent offenders against youth and protecting the public. The Act thus does not violate substantive due process.

5. The dissent agreed that the Act did not violate substantive due process, but disagreed with the majority's conclusion that it violated procedural due process and equal protection. The dissent argued that the registration requirements are a collateral consequence of an adjudication of delinquency and juveniles receive due process during their adjudicatory hearings. There is thus no procedural due process violation.

Moreover, juvenile violent offenders against youth are not comparable to juvenile sex offenders, so disparate treatment does not violate equal protection. In providing early termination to sex offenders, the legislature recognized that many sex offenses by juveniles were the result of sexually immature rather than predatory conduct. The legislature has not recognized any similar concern with violent behavior by juveniles. Accordingly, there is a rational basis to treat the two groups differently.

(Defendant was represented by Assistant Defender Rachel Moran, Chicago.)

People v. Alvarado, 2011 IL App (1st) 082957 (No. 1-08-2957, 12/30/11)

1. Generally, constitutional challenges are resolved under one of three standards. "Strict scrutiny" applies where a statute implicates a fundamental right or discriminates based upon a suspect class such as race or national origin. Where strict scrutiny applies, a statute will be upheld only if it is narrowly tailored to serve a compelling State interest. Classifications based on age are not "suspect."

A statute that does not involve a fundamental constitutional right or a suspect classification is subject to one of the two other tests. First, the "rational basis" test requires only that the statute bear a rational relationship to the legislative purpose for which it was enacted. Second, the "intermediate scrutiny" test, which lies between "rational basis" and "strict scrutiny" review, applies to classifications based on gender or illegitimacy or which may cause content-neutral, incidental burdens to the constitutional right in question.

2. The court found that the Second Amendment is not violated by the aggravated unlawful use of a weapon statute (720 ILCS 5/24-1.6(a)(1)(a)(3)(C)) and (a)(3)(I)), which bans carrying loaded firearms where the possessor is not on his or her land or in his or her home or fixed place of business and either has not been issued a FOID card or is between the ages of 18 and 21. (See **UNLAWFUL USE OF WEAPONS**, §53-1).

3. The court rejected the argument that the aggravated unlawful use of a weapon statute (720 ILCS 5/24-1.6(a)(1)(a)(3)(I))) violates equal protection in that it prohibits only adults who are 18, 19, and 20 from exercising the constitutional right to bear arms.

The equal protection clause requires that the government treat similarly situated persons in a similar manner. The right to equal protection does not preclude the State from drawing distinctions between different

categories of people, but merely prohibits according different treatment to persons who had been placed into separate classes on the basis of criteria that are wholly unrelated to the purpose of the legislation.

Because the AUUW statute does not infringe on the core of the Second Amendment – the right to possess a handgun in the home for self-defense purposes - the appropriate standard is either intermediate scrutiny or the rational basis test. The court concluded that for equal protection purposes, the AUUW statute satisfies the intermediate scrutiny and rational basis tests for the same reasons that it satisfies the intermediate scrutiny test for purposes of a Second Amendment challenge.

(Defendant was represented by Assistant Defender Douglas Hoff, Chicago.)

People v. Yoselowitz, 2011 IL App (4th) 100764 (No. 4-10-0764, 9/20/11)

Neither the proportionate penalties clause of the Illinois Constitution nor equal protection principles were violated by 720 ILCS 550/5(g), which provides a Class X sentence for the manufacture, delivery, or possession of more than 5000 grams of cannabis with intent to deliver or manufacture.

The court acknowledged recent studies showing that cannabis is neither addictive nor likely to lead to great bodily harm, but found that the legislature imposed the Class X sentencing provision to combat illegal drug use by directing law enforcement efforts to commercial traffickers and large scale purveyors of illegal substances. The court found that such legislative intent constituted a rational basis for the Class X sentencing scheme, and that imposing a Class X sentence on purveyors of large quantities of marijuana was not shocking to the moral sense of the community. The court also noted that defendant's arguments concerning the effects of marijuana use should be addressed to the legislature rather than the courts.

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§48-3(d)
Right of Privacy

Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) Statute making it a crime for married couples to use contraceptives is unconstitutional. The statute infringed on the marriage relationship, which is within the zone of privacy created by fundamental constitutional guarantees.

Lawrence v. Texas, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) Due process was violated by a Texas statute prohibiting sodomy between consenting adults of the same gender.

Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.

Stanley v. Georgia, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969) Statute prohibiting the private possession of obscene materials in one's home infringed upon the right of privacy.
Osborne v. Ohio, 495 U.S. 103, 110 S.Ct. 1691, 109 L.Ed.2d 98 (1990) A state may constitutionally prohibit the possession and viewing of child pornography.

Roe v. Wade, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) A right of personal privacy, although not explicitly mentioned in the Constitution, does exist under the Constitution. This privacy right has roots in at least the First, Fourth, Fifth, Ninth and Fourteenth Amendments.

The right of privacy encompasses a woman's decision to have an abortion. Thus, during the first trimester of pregnancy the abortion decision must be left to the medical judgment of the woman's physician. After the first trimester, the State may regulate the abortion procedure in ways reasonably related to maternal

health, and after viability the State may regulate and proscribe abortion except where necessary to preserve the life or health of the mother.

H.L. v. Matheson, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981) State statute requiring physicians to notify, "if possible," the parents of a minor who seeks an abortion was upheld. The minor in this case was unemancipated and dependent on her parents. See also, Ohio v. Akron, 497 U.S. 502, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) (upholding state statute allowing abortions on minors only after notice to parents or guardians or upon authorization by a court).

Webster v. Reproductive Health Services, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) State statute which banned use of public facilities and public employees, within the scope of their employment, to perform an abortion that was not necessary to save the life of the mother was constitutional.

Leopold v. Levin, 45 Ill.2d 434, 259 N.E.2d 250 (1970) Discussion of the right of privacy in Illinois.

People v. Malchow, 193 Ill.2d 413, 739 N.E.2d 433 (2000) The Sex Offender Registration Act (730 ILCS 150/1) and the Sex Offender and Child Murderer Community Notification Law (730 ILCS 152/101) do not violate the right to privacy under the United States and Illinois Constitutions. See also, People v. Cornelius, 213 Ill.2d 178, 821 N.E.2d 288 (2004) (Internet provision does not violate defendant's right to privacy under the Illinois Constitution).

People v. R.G., 131 Ill.2d 328, 546 N.E.2d 533 (1989) Freedom of choice concerning procreation, marriage and family life is a fundamental right; statutes restricting such right "may only survive if a compelling State interest exists."

Family Life v. Department of Public Aid, 112 Ill.2d 449, 493 N.E.2d 1054 (1986) The State Records Act, which requires the disclosure of the names of providers of abortion services and amounts paid for the services under the Medicaid program, was upheld against the claim that it violated the privacy rights of the providers and recipients.

ISEA v. Walker, 57 Ill.2d 512, 315 N.E.2d 9 (1974) Article I, §6 of the Illinois Constitution of 1970 did not create a right of privacy which restricts government action with respect to the disclosure of economic interests by State officers and employees.

People v. Kohrig, 113 Ill.2d 384, 498 N.E.2d 1158 (1986) The mandatory seat belt statute does not infringe upon any right of privacy under the federal or state constitution.

Chicago v. Wilson, 75 Ill.2d 525, 389 N.E.2d 522 (1978) A city ordinance prohibiting a person from wearing clothing of the opposite sex was unconstitutional as applied to these defendants, whose cross-dressing was part of therapy in preparation for sex reassignment operations. The ordinance was an unconstitutional infringement of defendant's "liberty interests." However, the ordinance was not held invalid on its face.

Illinois NORML v. Scott, 66 Ill.App.3d 633, 383 N.E.2d 1330 (1st Dist. 1978) The private use and possession of cannabis is not protected by the right of privacy.

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§48-3(e)
Right of Assembly

Adderley v. Florida, 385 U.S. 39, 87 S.Ct. 242, 17 L.Ed.2d 149 (1966) Rights of freedom of speech, press, assembly, and petition are not violated by conviction for trespass for protest demonstration that blocked traffic in jail driveway which was not normally used by the public. A state may control the use of its property for its own lawful, nondiscriminatory purposes.

Walker v. Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967) Protestors had no right to violate injunction restraining them from engaging in mass street parade without a permit, though the injunction was subject to substantial constitutional question. Protesters should not have bypassed orderly judicial review.

Cox v. Louisiana, 379 U.S. 536, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965) There are proper restrictions on the exercise of First Amendment rights — the government has the right to keep streets and public buildings open, and a person may not ignore traffic lights as a means of protest. Communication of ideas by conduct is not afforded the same protection as communication by pure speech.

Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) Picketing or parading near courthouse with the intent to influence the administration of justice may be prohibited. Compare, **U.S. v. Grace**, 461 U.S. 171, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (can't prohibit banners, etc. from public sidewalk adjacent to court).

Police Department of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972) City ordinance prohibiting picketing near a school was invalid because it made an impermissible distinction between peaceful labor picketing and other peaceful picketing.

Shuttlesworth v. Birmingham, 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965) Constitution violated by city ordinance that is so broad it could be construed as permitting a person to stand on a public sidewalk only at the whim of a police officer.

Edwards v. South Carolina, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963) Peaceful assembly at site of state government is protected by First Amendment.

Gregory v. Chicago, 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969) A protest march, if peaceful and orderly, is protected by the First Amendment regardless of the fact that onlookers become unruly.

Wright v. Georgia, 373 U.S. 284, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963) Convictions reversed where African-Americans played basketball in park after being told by police to leave.

Brown v. Louisiana, 383 U.S. 131, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966) Conviction reversed for peacefully remaining in public library, without creating a disturbance, after being asked to leave.

Los Angeles v. Vincent, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) City ordinance prohibiting signs on public property does not violate the First Amendment.

Ward v. Rock, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) A city did not violate the First Amendment by requiring the sponsors of musical performances in a park to use sound-amplification equipment and sound technician provided by the city; requirement was a reasonable regulation of the place and manner of expression, as the purpose was to assure that the performances were loud enough for the audience without intruding on nearby residences.

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§48-3(f)
Abusive Language

Gooding v. Wilson, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972) State statute making it a crime to use opprobrious or abusive language tending to cause breach of the peace was held unconstitutional; the statute had not been narrowed by state courts to apply only to "fighting words" which tend to incite an immediate breach of the peace.

Plummer v. Columbus, 414 U.S. 2, 94 S.Ct. 17, 38 L.Ed.2d 3 (1973) City Code providing that "no person shall abuse another by using menacing, insulting, slanderous, or profane language" is unconstitutional, because it punishes only spoken words and is not limited in application to unprotected speech. Though the ordinance may be neither vague nor otherwise invalid as applied to defendant, he may raise its vagueness or unconstitutional overbreadth as applied to others. Furthermore, if the law is found deficient it may not be applied to him until a satisfactory limiting construction is placed on it.

Lewis v. New Orleans, 415 U.S. 130, 94 S.Ct. 970, 39 L.Ed.2d 214 (1974) Constitution is violated by city ordinance stating that it shall be unlawful for any person to wantonly curse or revile or to use obscene or opprobrious language toward police officer in actual performance of his duties. The ordinance punishes the spoken word, which is constitutionally protected. See also, **Norwell v. Cincinnati**, 414 U.S. 14, 94 S.Ct. 187, 38 L.Ed.2d 170 (1973) (one may not be punished for nonprovocatively voicing objection to what he feels is the highly questionable detention by officer; ordinance operated to punish defendant for constitutionally protected speech).

Hess v. Indiana, 414 U.S. 105, 94 S.Ct. 326, 38 L.Ed.2d 303 (1973) Defendant's words "we'll take the fucking street later," spoken while facing a crowd at an antiwar demonstration while sheriff and deputies were attempting to clear the street, were constitutionally protected. Defendant's remarks could not be punished as obscene or "fighting words" or as having "a tendency to lead to violence."

Bradenburg v. Ohio, 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969) A state may not prohibit speech advocating use of force or violation of law, except where such speech is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.

R.A.V. v. St. Paul, Minnesota, 505 U.S. 377, 112 U.S. 2538, 120 L.Ed.2d 305 (1992) On First Amendment grounds, the Supreme Court invalidated a city ordinance that prohibited use of symbols or objects, such as burning crosses or Nazi swastikas, which "one knows or has reasonable grounds to know arouse anger, alarm or resentment" based upon "race, color, creed, religion or gender." Although lower courts had limited application of the ordinance to "fighting words," the majority found that even fighting words cannot be restricted solely because they express a message that the government disfavors. Thus, though the city could outlaw all fighting words, it could not prohibit only those which express a message of racial, religious or gender-based hatred.

City of Harvard v. Gaut, 277 Ill.App.3d 1, 660 N.E.2d 259 (2d Dist. 1996) A municipal ordinance prohibiting the wearing of "known gang colors, emblems, or other insignia" or appearing to be "communicating gang-related messages through the use of hand signals or other means of communication" was constitutionally overbroad. First, the ordinance criminalizes a substantial amount of behavior protected by the First Amendment because it prohibits symbolic speech by nongang members using "gang colors" for non-gang purposes (i.e., to show support for athletic teams). In addition, the ordinance fails to define "gang,"

"gang symbol," or "gang colors," and the record showed that "gang colors" and "symbols" may change at any time based solely on the whims of gang members themselves. Finally, the ordinance interfered with the right to free exercise of religion because the "gang symbol" at issue here -- the Star of David -- is also a recognized religious symbol.

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§48-3(g)
News Media Cases

Mills v. Alabama, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966) State statute making it a crime to solicit votes on election day is unconstitutional as violating freedom of the press; editor's conviction (based on election day editorial) was reversed.

Monitor Patriot v. Roy, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971) Publications concerning candidates for public office are accorded at least as much First Amendment protection as those concerning occupants of public office.

Ocala Star-Banner v. Damron, 401 U.S. 295, 91 S.Ct. 628, 28 L.Ed.2d 57 (1971) A charge of criminal conduct against a public official is always relevant regardless of how remote in time or place; the First Amendment requires a showing of actual malice before recovery of damages is permitted.

Time v. Page, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971) Magazine did not engage in actual malice by omitting word "alleged" in article concerning police brutality.

New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) Sets out rules for libel action by public official in light of First Amendment protections — requires proof of actual malice.

Bigelow v. Virginia, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) Defendant, a Virginia newspaper editor, was convicted for publishing an advertisement concerning placements for abortions in New York. The conviction was based on a Virginia law prohibiting the circulation of any publication to encourage or prompt an abortion.

The Virginia law violated the First Amendment. The state courts erred in assuming that advertising was not entitled to First Amendment protection — speech is not stripped of First Amendment protection merely because it is in the form of a paid commercial advertisement.

Cox Broadcasting Co. v. Cohn, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975) State could not constitutionally impose sanctions for the accurate publication of rape victim's name when the television reporter's information was obtained from public court records and based on his notes taken during court proceedings. Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it. See also, Florida Star v. F., 491 U.S. 524, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (First Amendment was violated by imposition of civil damages on a newspaper for publishing the lawfully-obtained name of a sex offense victim).

Oklahoma Publishing Co. v. Dist. Court, 480 U.S. 308, 97 S.Ct. 1045, 51 L.Ed.2d 355 (1977) State court order which enjoined newspaper from publishing the name or picture of a minor involved in a pending juvenile proceeding was an unconstitutional infringement upon the freedom of the press. See also, In Re Minor, 127 Ill.2d 247, 537 N.E.2d 292 (1989) (in the absence of a serious and imminent threat of harm to a minor's well-being which cannot be obviated by some less-restrictive means, a newspaper may not be prohibited from reporting the identity of a minor charged in a closed criminal proceeding, where the identity

is learned through ordinary reportorial techniques).

Smith v. Daily Mail, 443 U.S. 97, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) The First and Fourteenth Amendments were violated by State statute which made it a crime for a newspaper to publish, without the approval of the juvenile court, the name of any youth charged as a juvenile offender.

Landmark Communications v. Virginia, 435 U.S. 829, 98 S.Ct. 1535, 56 L.Ed.2d 1 (1978) State statute which made it a crime to divulge information regarding proceedings before a judicial review commission, which heard complaints against judges, was unconstitutional. The First Amendment will not permit the criminal punishment of third persons who are strangers to the inquiry (a newspaper in this case) for divulging or publishing truthful information regarding confidential proceedings of a judicial review commission.

Nebraska Press v. Stuart, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) A "gag order" imposed upon the press was invalid. Such orders carry a "heavy burden" to show necessity.
Chandler v. Florida, 449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981) The constitution does not prohibit all photographic, radio, and television coverage of criminal trial in state courts.

Nixon v. Warner Communications, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978) The First Amendment generally grants the press no right to information about a trial superior to that of the general public. Furthermore, the Sixth Amendment right to a public trial does not require that any part of a trial be broadcast live or on tape to the public — the requirement of a public trial is satisfied where members of the public and press have the opportunity to attend the trial and report what they have observed.

Houchins v. KQED, 438 U.S. 1, 98 S.Ct. 2588, 57 L.Ed.2d 553 (1978) The news media has no greater constitutional right of access to a county jail over and above, or in different form, than that accorded the public generally.

Globe Newspapers v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) The First Amendment was violated by a State statute which required the exclusion of the press and public from the courtroom during the testimony of minor victims in rape and sexual assault cases. Although the right of access to criminal trials is not an absolute, the press and public may be barred only in limited circumstances where the State shows that exclusion "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."

Richmond Newspaper v. Virginia, 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) Prior to the start of defendant's fourth trial for the offense of murder (conviction after the first trial was reversed on appeal and the second and third trials ended in mistrials), defense counsel moved to close the trial to the public and press. The prosecutor stated that he had no objection to the closing, and the trial judge excluded the public and press during trial.

Under the First and Fourteenth Amendments the public and the press have the right to attend criminal trials. The trial judge made no findings to support the closure, made no inquiry concerning alternative solutions, and failed to recognize the constitutional right of the public and press to attend the trial. "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."

Press Enterprise v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) The voir dire proceedings in a criminal trial may not be closed to the press and public without specific findings that closure is essential to a fair trial and that alternatives are inadequate.
Gannett v. DePasquale, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) Trial judge properly excluded the press and public from a pretrial proceeding where defendants, the prosecutor and the trial judge agreed

to the closure in order to assure a fair trial.

The Sixth Amendment confers the right to a public trial only upon a criminal defendant; the members of the public have no constitutional right, under the Sixth or Fourteenth Amendments, to attend criminal trials. Assuming, but not deciding, that the press and public have the right of access to pretrial hearings under the First and Fourteenth Amendments in some situations, the closure in this case was proper because the spectators failed to object at the time of the closure motion, the trial judge balanced the rights of the press and public against defendants' right to a fair trial, the trial judge found that an open hearing would pose a "reasonable probability of prejudice to these defendants," and the denial of access was only temporary.

Zurcher v. Stanford Daily, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978) The First Amendment does not prohibit the issuance and execution of search warrants for the seizure of criminal evidence reasonably believed to be on the premises occupied by a newspaper:

> "Properly administered, the preconditions for a warrant . . . probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness . . . should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices."

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§48-3(h)
Government Loyalty and Flag Desecration

Scales v. U.S., 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782 (1961) Portion of Smith Act making it a crime to be a member of any organization which advocates the overthrow of the government by force is upheld, but the essential element of specific intent to bring about violent overthrow as speedily as circumstances permit must be proved, though not expressly required in the Act.

Cole v. Richardson, 405 U.S. 676, 92 S.Ct. 1332, 31 L.Ed.2d 593 (1972) Statute requiring state employees to take oath to uphold and defend constitution and to oppose overthrow of government is constitutional.

Law Students Civil Rights Council v. Wadmond, 401 U.S. 154, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971) New York's character and fitness requirement, such as that applicant furnish proof that he believes in the U.S. form of government, is constitutional.

Baird v. State Bar, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed.2d 639 (1971) Applicant for state bar was protected by First Amendment from disclosing whether she had been a member of Communist Party. It was error to refuse to process her application merely because she failed to answer that question.

Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) Defendant was convicted of violating a state flag desecration statute. Conviction reversed because it may have been based on the spoken word alone rather than for his deed of burning a flag. (The same result was reached in **Bachellar v. Maryland**, 379 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970), where a conviction for disorderly conduct may have resulted from defendant's view on Vietnam war, which did not constitute "fighting words").

U.S. v. Eichman, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990) Federal act permitting prosecution of individuals for burning the American flag violated the First Amendment. See also, **Texas v. Johnson**, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (State statute prohibiting desecration of national flag unconstitutional).

Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) State flag misuse statute held unconstitutional as applied to action of a college student who, on private property, displayed U.S. flag upside down with a peace symbol affixed.

Smith v. Goguen, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) Defendant's conviction for flag misuse, based on having U.S. flag sewn on the seat of his trousers, is unconstitutional.

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§48-3(i)
Separation of Powers

People v. Joseph, 113 Ill.2d 36, 495 N.E.2d 501 (1986) Statute requiring that Post-Conviction Hearing Act proceedings be conducted "by a judge who was not involved in the original proceeding which resulted in conviction," is unconstitutional as a violation of the separation of powers provision of the Illinois Constitution. The statute unduly encroaches on the court's administrative and supervisory authority and conflicts with Supreme Court Rule 21(b), which gives the chief judge of each circuit the authority to issue "orders providing for assignment of judges."

Though the separation of powers provision does not contemplate "rigidly separated compartments," if a "power is judicial in character, the legislature is expressly prohibited from exercising it." The administration of the judicial system is "an element of the 'judicial power' exclusively conferred on the courts."

In "an area into which it is arguable that the 'judicial power' extends," however, the legislature is not excluded "from acting in any way which may have a peripheral effect on judicial administration."

People v. Jackson, 69 Ill.2d 252, 371 N.E.2d 602 (1977) Statute which gives counsel the right to conduct voir dire examination conflicts with Supreme Court Rule 234 and is void as a legislative infringement on the judicial power.

People v. Williams, 124 Ill.2d 300, 529 N.E.2d 558 (1988) Statute which gives the State the right to a substitution of judge was upheld. Statute does not conflict with Supreme Court Rules and does not unduly encroach upon the inherent powers of the judiciary. Rather, it only peripherally affects the role of the judiciary and does not violate separation of powers.

People v. Flores, 104 Ill.2d 40, 470 N.E.2d 307 (1984) A statute which mandates how long a trial judge must wait before proceeding with a trial in absentia, after defendant willfully absented himself during trial, would improperly infringe upon the judge's authority to control his docket. "Each judge in Illinois is responsible for the efficient and expeditious handling of all matters assigned to him or her." Statute which required a two-day wait before a trial in absentia may proceed was held to be permissive rather than mandatory.

People v. Izzo, 195 Ill.2d 109, 745 N.E.2d 548 (2001) 720 ILCS 5/21-6, which prohibits possessing or storing specified weapons "in any building or on land supported in whole or in part with public funds . . . without prior written permission from the chief security officer for such land or building," does not violate the separation of powers doctrine because it authorizes a party other than the State's Attorney to bring, modify, or dismiss criminal charges. Although chief security officers may give permission to store or possess weapons on public property, the ability to prosecute persons for failing to obey the statute rests solely with the State's Attorney.

Further, no separation of powers problem would be created even if §21-6 could be construed as shifting part of the prosecutorial power from the State's Attorney to another set of government officials; the

powers and duties of State's Attorneys are defined by statute, and can therefore be revised by statutory amendment, and §21-6 does not purport to transfer prosecutorial power from the executive branch to the judiciary or legislative branches.

People ex rel. Daley v. Moran, 94 Ill.2d 41, 445 N.E.2d 270 (1983) The State's Attorney is vested with "exclusive discretion in the initiation and management of a criminal prosecution," which includes "the decision whether to prosecute at all, as well as to choose which of several charges shall be brought." A trial judge may not determine which offense shall be charged, may not direct that an information be filed over the State's objection, and may not accept a guilty plea on such an information. See also, **People ex rel. Daley v. Suria**, 112 Ill.2d 26, 490 N.E.2d 1288 (1986) (if judge is not satisfied with factual basis for guilty plea, he may only refuse to accept the plea; he may not enter conviction on a lesser included offense); **People v. Deems**, 81 Ill.2d 384, 410 N.E.2d 8 (1980) (improper for judge to deny State's motion to dismiss charge, call the case to trial, and then enter "acquittal").

People v. Lawson, 67 Ill.2d 449, 367 N.E.2d 1244 (1977) Trial judge has the inherent authority to dismiss an indictment where there has been a clear denial of due process. Trial judge has the "inherent authority to insure the defendant a fair trial and may impose sanctions to do so."

People v. Van Cleve, 89 Ill.2d 298, 432 N.E.2d 837 (1982) Trial judge has the authority to enter a judgment of acquittal notwithstanding the verdict, though the criminal code does not provide express authorization.

O'Connell v. St. Francis, 112 Ill.2d 273, 492 N.E.2d 1322 (1986) Statutes that precluded the trial judge from ruling on motions to dismiss unduly infringed on judicial power.

People v Rolfingsmeyer, 101 Ill.2d 437, 461 N.E.2d 410 (1984) Statute which provides that a person's refusal to submit to a breath test shall be admissible at his trial does not violate the separation of powers clause. The legislature "has the power to prescribe new and alter existing rules of evidence or to prescribe methods of proof."

People ex rel. Carey v. Bentivenga, 83 Ill.2d 537, 416 N.E.2d 259 (1981) A judge does not have authority to impose a sentence which is not authorized by statute.

People v. Youngbey, 82 Ill.2d 556, 413 N.E.2d 416 (1980) Statute which requires a presentence report in felony cases does not improperly encroach upon the judicial power.

People v. Davis, 93 Ill.2d 155, 442 N.E.2d 855 (1982) Statutes which provide for a judge to state the reasons for a sentence on the record are directory rather than mandatory. A statute which places a mandatory requirement on a judge to state reasons for the sentence would be an improper infringement upon an exclusive judicial function.

People v. Taylor, 102 Ill.2d 201, 464 N.E.2d 1059 (1984) Statute which requires the imposition of a natural life sentence upon conviction for murdering more than one person does not violate separation of powers. It is within the legislature's power to fix punishments for crimes; thus, the legislature necessarily has power to limit the discretion of courts in imposing sentences. See also, People v. Harmison, 108 Ill.2d 197, 483 N.E.2d 508 (1985) (mandatory "street value" fines in drug cases do not violate separation of powers).

People ex rel. Carey v. Cousins, 77 Ill.2d 531, 397 N.E.2d 809 (1979) The death penalty statute, which provides that a death penalty hearing shall be held "where requested by the State," does not violate the

separation of powers doctrine.

People v. Phillips, 66 Ill.2d 412, 362 N.E.2d 1037 (1977) A statute that requires the consent of a probation officer before defendant who is on probation and charged with an offense is eligible for drug abuse treatment "does not infringe upon the court's constitutional right to impose sentence."

People ex rel. Stamos v. Jones, 40 Ill.2d 62, 237 N.E.2d 495 (1968) The separation of powers doctrine was violated by a statute which provided that a person convicted of a forcible felony shall not be admitted to bail on appeal. The constitution "has placed responsibility for rules governing appeal in the Supreme Court, and not in the General Assembly."

People v. Cox, 82 Ill.2d 268, 412 N.E.2d 541 (1980) The separation of powers doctrine was violated by statute, which altered the standard for appellate review of sentences to a "rebuttable presumption" (rather than "abuse of discretion") and allowed appellate courts to reduce an imprisonment sentence to probation was held invalid. The provision was "in direct conflict with the decisions of this court which have interpreted the scope of Supreme Court Rule 615(b)(4)."

People v. Flatt, 82 Ill.2d 250, 412 N.E.2d 509 (1980) The Supreme Court has the authority to provide for appeals from other than final orders, and a statute which purports to authorize such appeals (such as an appeal from an order entered during trial) would be invalid.

People v. Bailey, 167 Ill.2d 210, 657 N.E.2d 953 (1995) The "no bail" provision for stalking and aggravated stalking violates neither the Illinois Constitution nor the separation of powers doctrine.

People v. Jung, 192 Ill.2d 1, 733 N.E.2d 1256 (2000) The separation of powers doctrine is not violated by 625 ILCS 5/11-501.4-1, which allows medical personnel to release to law enforcement officials the results of physician-ordered blood or urine tests conducted during emergency treatment for injuries resulting from a motor vehicle accident.

Murneigh v. Gainer, 177 Ill.2d 287, 685 N.E.2d 1357 (1997) Statutes which: (1) require courts to enter administrative orders mandating that previously-convicted DOC inmates provide blood samples for the purpose of developing a DNA database, and (2) provide that the deliberate refusal to give a blood sample "shall" be punishable as contempt of court, violate the separation of powers doctrine. The court system may not be required to exercise uniquely executive functions or to fulfill ministerial or administrative duties. Furthermore, because the contempt power is inherent in the judiciary, the legislature may not require judges to exercise the contempt authority under certain circumstances or in a particular manner.

People v. Sawczenko-Dub, 345 Ill.App.3d 522, 803 N.E.2d 62 (1st Dist. 2003) The 25-year to life enhancement for first degree murder based on the personal discharge of a firearm does not violate the separation of powers doctrine, double jeopardy, or the rule against double enhancement.

People v. Gray, 363 Ill.App.3d 897, 845 N.E.2d 113 (4th Dist. 2006) 730 ILCS 5/5-4-1(b), which provides that upon revocation of probation the judge who presided at the trial or accepted the guilty plea shall impose the new sentence unless he or she is no longer sitting as a trial judge, is directory rather than mandatory. A legislative attempt to mandate which judge should sentence a particular defendant conflicts with both "the judiciary's administrative power to assign cases and impose a sentence" and with Supreme Court Rule 21(b), which provides for the assignment of judges. Because §5-4-1(b) would violate the separation-of-powers doctrine if it imposed a mandatory duty, the word "shall" should be construed as directory only.

In re Derrico G., 2014 IL 114463 (No. 114463, 8/4/14)

Under §5-615 of the Juvenile Court Act, the State may object to the entry of an order of continuance under supervision in a juvenile case. 705 ILCS 405/5-615. The circuit court held that this statutory provision was unconstitutional both facially and as applied. The Illinois Supreme Court reversed the circuit court's ruling, holding that the statute was neither facially unconstitutional nor as applied to defendant.

1. For a statute to be facially unconstitutional, there must be no set of circumstances under which the statute would be valid. If a statute is constitutional as applied to a defendant, it usually cannot be challenged on the ground that it might be unconstitutional as applied to others. In other words, if the statute is constitutional as applied to defendant, "his facial challenge necessarily fails."

2. The separation of powers clause of the Illinois Constitution provides that none of the three branches of government "shall exercise powers properly belonging to another." Ill. Const. 1970 art. II, §1. The purpose of this provision is to ensure that the whole power of more than one branch does not reside in the same hands. But the provision was not designed to achieve a complete divorce among the three branches, and it does not divide governmental powers into rigid, mutually exclusive compartments. The three branches are parts of a single operating government and there will be areas where their functions overlap. As such, the separation of powers clause was not designed to effect a complete divorce between the branches.

The defendant argued that the prosecution's discretion to object to supervision infringed on the circuit court's sentencing authority. The Supreme Court rejected this argument, noting that it had previously decided that a statute which allowed prosecutors to decide when a juvenile would be subjected to prosecution as an adult did not violate separation of powers even though the statute gave the prosecution significant discretion to dictate the range of penalties to which a juvenile would be subject. The discretionary authority afforded the prosecution by §5-615 "pales by comparison."

Furthermore, under the version of the statute in effect here, the court may only continue the case under supervision before proceeding to adjudication. Thus, the State's objection must also occur before adjudication. Because defendant had not been adjudicated when the State objected and sentencing was not an issue, the State did not infringe on the court's right to impose sentence.

3. The equal protection clause requires the government to treat similarly situated individuals in a similar fashion unless it can demonstrate an appropriate reason to treat them differently. But the clause does not forbid the legislature from drawing proper distinctions among different categories of people unless it does so on the basis of criteria wholly unrelated to the legislation's purpose.

Defendant argued that equal protection was violated by the State's right to object to juvenile supervision but not adult supervision. The court rejected this argument on a number of grounds.

First, defendant could not show that he was similarly situated in all relevant aspects to the adult offenders he compared himself to. Equal protection does not forbid all classifications, only those that apply different treatment to people who are alike in all relevant respects. Here, defendant was not similarly situated to adult offenders charged with a felony, because such adult offenders are not eligible for supervision at all.

Second, defendant entered into a fully negotiated guilty plea. Having received significant consideration in return for his plea, defendant could not repudiate the very sentence he agreed to on the basis that it violated equal protection. The court found that defendant's position violated fundamental principles of fairness in the enforcement of guilty pleas.

Third, minors in delinquency proceedings are not comparable to adult offenders because they are generally not subject to the same deprivation of liberty. Delinquency proceedings are protective and intended to correct and rehabilitate rather than to punish. That difference extends to the role of the State.

The dissent would have held that as applied to this case, §5-615 violated the separation of powers clause. The circuit court had already accepted defendant's guilty plea when it continued the case under supervision. Although the circuit court did not enter a finding of guilt, the acceptance of the guilty plea was

itself a conviction. Conviction marks the traditional boundary beyond which the State's constitutionally permissible role in decisions affecting sentencing comes to an end. Accordingly, the State's objection to supervision violated the separation of powers doctrine.

People v. Blair, 2013 IL 114122 (No. 114122, 3/21/13)

When a statute is held facially unconstitutional, *i.e.*, unconstitutional in all its applications, it is said to be void *ab initio*. Such a declaration by a court cannot, within the strictures of the separation of powers clause, repeal or otherwise render the statute nonexistent. Rather, the statute is only considered unconstitutional from the moment of its enactment, and therefore unenforceable, but it remains on the statute books.

Ordinarily, the only way that the legislature may then remedy the statute's infirmity is by amending or reenacting the statute that was held unconstitutional. This is not the only recourse, however, when the infirmity in the statute is that it violates the proportionate penalties clause under the identical elements test. In that case, the proportionality violation arises out of the relationship of two statutes – the challenged statute and the comparison statute. To cure the infirmity, the legislature may amend the challenged statute, the comparison statute, or both.

In **People v. Hauschild**, 226 Ill. 2d 63, 871 N.E.2d 1 (2007), the court held that the sentence for armed robbery while armed with a firearm, which included a 15-year mandatory enhancement, violated the proportionate penalties clause because it was more severe than the penalty for the identical offense of armed violence based on robbery with a category I or II weapon. The legislature's subsequent enactment of P.A. 95-688 (eff. 10/23/07), which amended the armed violence statute to eliminate robbery as a predicate offense, remedied the disproportionality and revived the sentencing enhancement for armed robbery.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

People v. Hammond & Alberty, 2011 IL 110044 (Nos. 110044 & 110705, 12/1/11)

1. A probation officer has authority to file a petition charging a violation of a condition of probation. Therefore, no separation of powers violation occurred where the probation officer filed a petition informing the trial court and prosecutor of a probation violation and asking the judge to determine whether probation should be revoked and a different sentence imposed. Although the probation officer has discretion to file a petition concerning a probation violation, the court acknowledged that the authority to proceed with or dismiss the petition rests with the State's Attorney, who has the burden to prove the violation in a contested case.

2. Under 730 ILCS 5/5-6-1(i), a probation officer may, with the concurrence of his or her supervisor, offer intermediate sanctions for probation violations. In addition, 730 ILCS 5/5-6-1 requires the Chief Judge of each circuit to adopt a system of structured, intermediate sanctions for probation violations. Once intermediate sanctions are completed, probation may not be revoked for the same violation.

The court concluded that §5/5-6-1 does not violate the separation of powers doctrine despite the fact that the State's Attorney does not have veto power over the probation officer's decision to offer intermediate sanctions. The court concluded that §5-6-4 adopts a diversionary procedure intended to avoid revocation and the attendant costs to the criminal justice system. Thus, §5-6-4 represents the legislature's definition, as an exercise of its power to define crimes and sentences, of the circumstances in which revocation can be sought. such action by the legislature does not implicate powers of the executive branch.

The court noted other circumstances in which the State's Attorney's general authority to prosecute crimes has been limited without violating the separation of powers doctrine, including statutes giving discretion to juvenile police officers to handle juvenile offenses through station adjustments and the discretion of police officers to issue warnings in lieu of traffic citations.

3. No separation of powers violation occurred although the local court rules in question here required, as a default, that probation officers offer intermediate sanctions for probation violations unless the failure to do so can be justified to the trial judge. Such rules merely structure the probation officer's exercise

of discretion, and do not infringe on any power of the executive branch.

(Defendant Hammond was represented by Assistant Defender Catherine Hart, Springfield.)

(Defendant Alberty was represented by Assistant Defender Rachel Kindstrand, Chicago.)

People v. Bond, 405 Ill.App.3d 499, 942 N.E.2d 585 (4th Dist. 2010)

Under **People v. Montgomery**, 47 Ill.2d 510, 268 N.E.2d 695 (1971), juvenile adjudications are inadmissible to impeach the accused in a criminal case. The court concluded that **Montgomery** remains the law in Illinois, and that 705 ILCS 405/5-150(1)(c), which provides that the defendant in criminal cases may be impeached with juvenile adjudications "pursuant to the rules of evidence for criminal trials," is consistent with **Montgomery** because it allows impeachment with juvenile adjudications only when permitted by the rules of evidence, which include the **Montgomery** doctrine.

In the course of its holding, the court stated that a statute which conflicts with a rule of evidence adopted by the Illinois Supreme Court is void under the separation of powers doctrine. "Where our supreme court has specifically directed the trial courts to follow a particular rule, the legislature is not free to direct the trial courts otherwise."

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

People v. Hammond, Gaither, & Donahue, ___ Ill.App.3d ___, ___ N.E.2d ___ (4th Dist. 2009) (Nos. 4-08-0651, 0652 & 4-09-0214, 12/21/09)

730 ILCS 5/5-6-4(i), which authorizes a probation officer to offer intermediate sanctions for technical probation violations and precludes the trial court from revoking probation or imposing additional sanctions upon successful completion of the intermediate sanctions, does not violate the separate of powers doctrine. (See **PROBATION**, §40-5(a)).

(Defendants were represented by Assistant Defender Catherine Hart, Springfield.)

People v. Schneider, 403 Ill.App.3d 301, 933 N.E.2d 384 (2d Dist. 2010)

The Code of Corrections provides that the MSR term for certain offenses, including criminal sexual assault, "shall range from a minimum of 3 years to a maximum of the natural life of the defendant." 730 ILCS 5/5-8-1(d)(4).

The court held that this statute is ambiguous as it can be read to authorize the court to impose a determinate term anywhere between three years and life, or could be read to authorize the court to impose an indeterminate term of three years to life. Because the statute is ambiguous, the doctrine of *in pari materia* comes into play. According to this doctrine, two statutes dealing with the same subject should be considered with reference to one another to give them harmonious effect.

Applying this doctrine, the court considered other Code provisions. Other subsections of the Code provide for the imposition of a set term of MSR. The Code requires that terms are imprisonment be determinate, but contains no such requirement with respect to MSR terms. The Code gives the Department of Corrections (DOC) the authority to release a defendant from MSR when it determines that the defendant is likely to remain at liberty without committing another offense. 730 ILCS 5/3-3-8(b). It also provides for the extended supervision of sex offenders, 730 ILCS 5/3-14-2.5, and allows defendants serving extended MSR terms to request discharge from supervision. 730 ILCS 5/3-14-2.5(d). The court concluded that these provisions evidence that the legislature intended to require the court to set a minimum three-year MSR term and a maximum of life, and granted the DOC the authority to determine how long a defendant remains on MSR after three years.

The court rejected the argument that the statute delegated a judicial function to the DOC as only the court could impose a MSR term.

(Defendant was represented by Assistant Defender Patrick Carmody, Elgin.)

Top

§48-4
Single Subject Rule

Johnson v. Edgar, 176 Ill.2d 499, 680 N.E.2d 1372 (1997) P.A. 89-428, which contained several amendments to the sentencing and criminal codes as well as non-criminal provisions, was passed in violation of the "single subject" requirement of the Illinois Constitution.

P.A. 89-428 began as a bill relating to prisoners' reimbursement of the Department of Corrections for the expenses of incarceration, and ended as a 200-page bill including not only that subject but also sex offender registration, an eavesdropping exemption, penalty enhancement for certain criminal offenses, the creation of a new criminal offense, authorization to prosecute some juveniles as adults, changes concerning testimony at parole hearings, new fitness hearing requirements for criminal defendants on psychotropic medication, and amendment of existing law concerning the admissibility of child hearsay statements. In addition, the final bill contained a provision imposing an "environmental impact fee" on the sale of fuel to be used to reimburse the owners of leaking underground fuel storage tanks for the costs of correcting contamination resulting from such tanks.

The purpose of the "single-subject" rule is to prevent the passage of legislation which, standing alone, could not attract sufficient votes for enactment. Although the legislature is given wide latitude to define the meaning of the term "subject," the single subject rule is violated where the provisions of a bill have no "natural and logical connection." The "many discordant provisions in Public Act 89-428 [may not] be considered to possess a natural and logical connection"; therefore, the "single-subject" rule was violated.

The court rejected the argument that the provisions involved only one "subject" because they all concerned "public safety": "Were we to conclude that the many obviously discordant provisions . . . are nonetheless related because of a tortured connection to a vague notion of public safety, we would be essentially eliminating the single subject rule as a meaningful constitutional check on the legislature's actions."

While certain civil provisions of P.A. 89-428 were "validated" by the passage of subsequent legislation, in separate bills, on the same subjects, the Court did not suggest that the "validation" theory could be applied to the criminal provisions of P.A. 89-428.

People v. Burdunice, 211 Ill.2d 264, 811 N.E.2d 678 (2004) Article IV, §8(d) of the Illinois Constitution provides that legislation (except for appropriation bills and those codifying or rearranging laws) must be confined to one subject. The purpose of the single subject rule is to prevent the passage of legislation that would fail on its own merits, and to facilitate the passage of legislation in an orderly and informed manner. "In sum, the single subject rule ensures that the legislature addresses the difficult decisions it faces directly and subject to public scrutiny, rather than passing unpopular measures on the backs of popular ones."

Determining whether a public act violates the single subject rule requires a two-step analysis. First, the court must determine whether on its face, the act involves a single, legitimate subject. If so, the court must determine whether the various provisions within the Act relate to the single subject. Individual provisions relate to the single subject if they have a "natural and logical" connection to that subject.

Public Act 89-688, which added cellular telephone batteries to the list of contraband prohibited in penal institutions, violated the single subject rule. P.A. 89-688 was labeled "an Act in relation to criminal law," a legitimate single subject. Four of the five sections of the law address criminal law, including the provision adding cellular telephone batteries to the list of items which cannot be brought into a penal institution. Other criminal law provisions of P.A. 89-688 include amendments to the Statewide Grand Jury Act, the Violent Crime Victim's Assistance Act, and the Unified Code of Corrections. However, §0.5 of the

Act, which authorizes the Attorney General to file counterclaims on behalf of State employees involved in civil actions, does not have a natural and logical connection to criminal law.

In determining the purpose of a particular section, the reviewing court may examine legislative debates, Senate and House journals, and the legislative digest. However, such materials can not support a finding of legislative purpose which contradicts the plain language of the statute. Here, the plain language of §0.5 deals with the authority of the Attorney General to file counterclaims on behalf of State employees involved in civil suits. Because P.A. 89-688 concerns two subjects, the single subject rule was violated. See also, **People v. Foster**, 316 Ill.App.3d 855, 737 N.E.2d 1125 (4th Dist. 2000) (same).

People v. Dunigan, 165 Ill.2d 235, 650 N.E.2d 1026 (1995) The 1980 amendments to the Habitual Criminal Act were not passed in violation of the "three-readings" and "single-subject" requirements of the Illinois Constitution. (Article IV, §8(d) of the Illinois Constitution requires that a bill "shall be read by title on three different days in each house." Section 8(d) also provides: "Bills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject.")

The Illinois Constitution adopted the "enrolled-bill" rule, which provides that "when the presiding officers of the two houses sign a bill, their signatures become conclusive proof that all constitutional procedures have been properly followed." The Speaker of the House and President of the Senate certified the 1980 legislation as having been passed according to constitutional procedures; therefore, the Court was precluded from making any inquiry into whether the three-readings requirement was violated.

The "single-subject" requirement of the Constitution is a substantive rather than a procedural requirement; therefore, the "enrolled bill" rule does not preclude judicial review. However, the term "subject" is to be liberally construed, and bills with "broad" subject matter are not prohibited unless the bill combines "incongruous and unrelated matters." Because both the original bill concerning feticide and the provisions concerning the Habitual Criminal Act involved amendment of the Criminal Code, the requirements of the "single-subject" rule had been satisfied.

People v. Reedy, 186 Ill.2d 1, 708 N.E.2d 1114 (1999) Public Act 89-404, which enacted the "truth-in-sentencing" law effective August 1995, violated the "single-subject" rule of the Illinois Constitution. The legislation dealt with "as many as five separate legislative topics involving both civil and criminal matters" and "at least two unrelated subjects: matters relating to the criminal justice system, and matters relating to hospital liens."

The public act could not be upheld on the basis that the provisions all dealt with responsibilities of the State's Attorneys or fit within the subject of "governmental matters," as such sweeping and vague categories would render the single subject clause meaningless.

The State's proposed "waiver by codification" rule, which would preclude a defendant from raising a single subject rule challenge once an act has been codified was rejected. Such a codification rule would conflict with "well-established single-subject clause jurisprudence," which treats such violations with "seriousness." In addition, a codification rule would "drastically diminish the effect and importance of the single-subject clause," and improperly emphasize finality at the expense of enacting legislation via constitutional procedures. Finally, the time between passage of a bill and its codification might be "frequently minute."

The legislature did not cure the single subject rule violation when it enacted P.A. 89-462 (eff. May 29, 1996). Although the Illinois legislature has the power to enact curative legislation, such legislation "must exhibit on its face evidence that it is intended to cure or validate defective legislation." P.A. 89-462 was "entirely devoid of curative language that would validate any actions taken in reliance on P.A. 89-404." Instead, P.A. 89-462 merely amended the truth-in-sentencing statute by making an additional offense subject to truth-in-sentencing.

Finally, the single subject rule violation was not harmless "because each of the sections within Public act 89-404 possessed the necessary support for individual passage." The purpose of the single subject rule

is not only to prevent legislators from combining unpopular legislation with popular measures, but also to promote orderly and informed legislative debate by limiting the subject of each bill so that the issues can be more easily understood and debated. In addition, "when the procedure by which the General Assembly enacts legislation contravenes a constitutional mandate, a harmless error standard is inappropriate."

People v. Olender 222 Ill.2d 123, 854 N.E.2d 593 (2005) P.A. 88-669 violated the single subject rule. Defendants did not lack standing to raise a single subject rule challenge where nine years had passed since the passage of the act. A lapse of time between the effective date of an act and the bringing of a challenge might result in a loss of standing in civil cases, where a challenge may be brought any time after the act was passed. In criminal cases, however, a defendant does not have standing to challenge a statute until he or she is directly affected by it. Thus, although P.A. 88-669 became effective November 29, 1994, defendants could not have raised a single subject rule challenge until they were charged with violating the act.

P.A. 88-669 originally amended three criminal statutes, but by the time of its passage created two new statutes and amended 24 others. Among the provisions were changes to the penalties for certain income tax violations (the provisions which affected defendants) and acts relating to university research parks, creation of a council to study issues relating to "geographic information management technology," and amendments to several financial statutes.

"Governmental regulation" is not a single subject for purposes of the single subject rule. "[I]t is likely that any legislative action could fit within the broad category of government regulation."

Also, "revenue to the State and its subdivisions" is not a "single subject." The State's interpretation of "revenue" was so broad that "almost any statute would have a natural and logical connection to the subject of revenue to the State as long as the statute had any tangential impact on the State's economy."

Interestingly, both the governor and several members of the Senate observed during legislative debates in 1994 that P.A. 88-669 was a "Christmas tree" bill which violated the single subject rule.

People v. Cervantes, 189 Ill.2d 80, 723 N.E.2d 265 (1999) Public Act 88-680, which created the offense of gunrunning, violated the single subject rule of the Illinois Constitution. Although the act originally amended the Criminal Code to require community service by a person convicted of or placed on supervision for certain offenses, by the time of its passage it created the "Safe Neighborhoods Law" and amended 55 existing statutes, created ten new statutes, and repealed one statute.

"[N]o matter how liberally the single-subject requirement is construed," there is "no natural and logical connection between the subject of enhancing neighborhood safety" and amendments to the Women's Infant and Children Vendor Management Act or the Secure Residential Youth Care Facilities Licensing Act. The WIC amendments are not related to a single subject merely because P.A. 88-680 also created the new offense of WIC benefits fraud; the amendments to the Vendor Management Act bear no "natural and logical connection to neighborhood safety."

Also, the Secure Residential Youth Care Facility Licensing Act has no relation to "neighborhood safety." The Act was intended to authorize secure residential youth care facilities owned by private enterprises, so that children who are too young to be placed in the Department of Corrections but "too dangerous to be set free" would remain in Illinois instead of being sent elsewhere. Because the residential youth facility provisions concern only the geographical location in which such youths will be held, "these purely administrative licensing provisions are not germane to the subject of safe neighborhoods."

Arangold Corp. v. Zehnder, 187 Ill.2d 341, 718 N.E.2d 191 (1999) The test for determining whether the single subject rule has been violated "is whether the matters included within the enactment have a natural and logical connection to a single subject. . . This court has never held that the single subject rule imposes a second and additional requirement that the provisions within an enactment be related to each other."

Although P.A. 89-21 amended a number of acts already in effect, all of the provisions had a "natural and logical connection" to a single subject - implementation of the State budget for the 1996 fiscal year. The

"State budget" is not too broad to constitute a single subject. The General Assembly "was not attempting to unite obviously discordant provisions under some broad and vague category," but merely to include within one bill "all the means reasonably necessary to accomplish" the purpose of implementing the State budget.

People v. Sypien, 198 Ill.2d 334, 763 N.E.2d 264 (2001) The single subject rule was violated by P.A. 90-456 (eff. January 1, 1998), which increased the penalties for certain disorderly conduct offenses, defined making a false 911 call as disorderly conduct, authorized officers executing search warrants to dispense with the "knock and announce" requirement under certain circumstances, and amended the Juvenile Court Act to authorize delay in adjudicatory hearings where necessary to insure a fair hearing.

A two-part inquiry is required to determine whether a public act violates the single subject rule. First, the court must determine whether the act, on its face, involves a legitimate single subject. Second, the court must determine whether all of the provisions of the act relate to that subject.

The purported subject of P.A. 90-456 - criminal law - has previously been found to pass constitutional muster, however not all of the provisions of P.A. 90-456 relate to criminal law. The amendment authorizing delay in the completion of adjudicatory hearings for abused, neglected or dependent children has no connection to criminal law.

Juvenile delinquency proceedings are analogous to criminal proceedings, and an act which both modifies the Criminal Code and amends Juvenile Court Act provisions concerning delinquency proceedings might relate to the single subject of "criminal law." Here, however, the amendments concerned only abuse, neglect and dependency proceedings, which are clearly civil "both in the legal and lay sense of the word." See also, **People v. Vasquez**, 315 Ill.App.3d 1131, 734 N.E.2d 1023 (1st Dist. 2000) (P.A. 86-980, which amended the Juvenile Court Act to authorize the confiscation of weapons in the possession of minors and amended the Criminal Code by creating new offenses, did not violate the single subject rule; each of the provisions involved criminal conduct whether reflected by the Juvenile Court Act or the Criminal Code).

People v. Tellez-Valencia, 188 Ill.2d 523, 723 N.E.2d 223 (1999) A statute that is held unconstitutional is void ab initio. Where the act creating the offense of which defendant was convicted has been held unconstitutional under the single subject rule, the State may not amend the charge on appeal to change the name of the offense to one which consists of the same elements.

People v. Wooters, 188 Ill.2d 500, 722 N.E.2d 1102 (1999) Public Act 89-203, which enacted a mandatory life imprisonment provision for the murder of a child under 12, violated the single subject rule.

Although defendant raised the single subject rule challenge for the first time on appeal, "the constitutional dimension of the question permits this court to address" the argument.

Public Act 89-203 was entitled "An act in relation to crime," and most of the amendments were related to "crime." However, amendments to the Illinois Mortgage Foreclosure Law were "distinctly noncriminal in nature" and lacked "even a tenuous connection" to the subject of "crime."

The court rejected the argument that P.A. 89-203 should be upheld because it did not offend the purpose of the single subject clause - to prevent the attachment of unpopular legislation to a popular bill to insure passage of the unpopular provisions. The single subject rule has an equally important second purpose - to promote orderly legislative debate on bills encompassing only one subject. Further, the State's representations concerning the legislative history of P.A. 89-203 were "somewhat misleading;" the provisions of P.A. 89-203 were never considered individually by both chambers of the General Assembly.

People v. Ramsey, 192 Ill.2d 154, 735 N.E.2d 533 (2000) At defendant's jury trial for murder, the trial court applied the version of the insanity defense enacted by P.A. 89-404, which eliminated the insanity defense based on a defendant's inability to conform his conduct to the law. After defendant's trial, the Supreme Court held that P.A. 89-404 violated the single subject rule. Because defendant was convicted under an unconstitutional amendment to the insanity defense, he was entitled to a new trial at which the trial court was

to apply the version of the insanity defense in effect before P.A. 89-404 was enacted.

People v. Boclair, 202 Ill.2d 89, 789 N.E.2d 734 (2002) P.A. 83-942, which authorized trial courts to summarily dismiss post-conviction petitions that are frivolous or patently without merit, did not violate the single subject rule.

People v. Malchow, 193 Ill.2d 413, 739 N.E.2d 433 (2000) Public Act 89-8, which amended the Sex Offender Registration Act (730 ILCS 150/1) to expand the class of persons required to register, did not violate the single subject rule.

People v. Fuller, 324 Ill.App.3d 728, 756 N.E.2d 255 (1st Dist. 2001) The single subject rule was not violated by P.A. 89-707, which: (1) made commission of any form of aggravated kidnaping a Class X felony, (2) made numerous changes to the Child Sex Offender and Murderer Community Notification Law (including expanding criminal and civil immunity for the secondary release of information obtained under the Act), (3) added "county correctional officer" as a person who may satisfy the requirement that the sheriff attend court sessions, and (4) amended the Police Training Act to change some definitions, deleted the requirement that minimum standards for court security officers be developed, and added the requirement that persons hired as court security officers must demonstrate compliance with training requirements. All of the provisions hold a "natural and logical" conviction to a single subject - the proper administration of justice.

People v. Terry, 329 Ill.App.3d 1104, 769 N.E.2d 559 (4th Dist. 2002) P.A. 90-593 (eff. June 19, 1998), which re-enacted amendments to the insanity defense found unconstitutional in **People v. Reedy**, 186 Ill.2d 1, 708 N.E.2d 1114 (1999), did not violate the single subject rule of the Illinois Constitution. All of the provisions of P.A. 90-593, including amendments to the Drug Asset Forfeiture Procedure Act, were related to the single subject of criminal law.

People v. Jones, 318 Ill.App.3d 1189, 744 N.E.2d 344 (4th Dist. 2001) Public Act 83-942, which authorized summary dismissal of post-conviction petitions as frivolous or patently without merit, did not violate the single subject rule of the Illinois Constitution.

People v. Lane, 319 Ill.App.3d 162, 743 N.E.2d 1107 (5th Dist. 2001) Public Act 89-689, which amended the Code of Criminal Procedure to provide that a defendant who is taking psychotropic drugs shall not be presumed to be unfit solely by the receipt of those drugs, did not violate the single subject rule of the Illinois Constitution.

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People v. Crutchfield, 2015 IL App (5th) 120371 (No. 5-12-0371, 6/29/15)

A statute that has been declared unconstitutional because it was adopted in violation of the single subject rule is void in its entirety, and the legislature may revive the statute only by reenacting the same provision.

Defendant was sentenced to life imprisonment pursuant to 730 ILCS 5/5-8-1(a)(1)(c)(ii), which mandates a sentence of life imprisonment when a person over the age of 17 murders a person under the age of 12. The Appellate Court vacated defendant's sentence since the public act which enacted this sentencing provision (Public Act 89-203) had been declared unconstitutional in violation of the single subject rule (**People v. Wooters**, 188 Ill. 2d 500 (1999)), and the legislature had never reenacted the sentencing provision.

The Appellate Court specifically rejected the State's argument that the legislature cured the single subject violation by enacting Public Act 89-462 which "recodified" the sentencing provisions in another

public act that had also been declared in violation of the single subject rule. The Court stated that it found "no indication that Public Act 89-462 addressed the single subject rule violation in Public Act 89-203." Instead it "merely reenacted the change from discretionary to mandatory natural life sentences for certain offenses," and hence did not cure the infirmity of Public Act 89-203.

The Court remanded defendant's case for resentencing without applying the mandatory life sentence provision of section 5-8-1(a)(1)(c)(ii).

(Defendant was represented by Assistant Defender John McCarthy, Springfield.)

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